THE

MONTHLY LAW REPORTER.

MARCH, 1854.

THE IMPEACHMENT OF JUDGE HUBBELL, OF WISCONSIN.[1]

THE trial of the impeachment of the Hon. Levi Hubbell, Judge of the Second Judicial Circuit of the State of Wisconsin, for corrupt conduct and malfeasance in office, which was had in June last at Madison, Wisconsin, apart from that interest which always, from the rarity of the occurrence, attaches to such a trial, attracted considerable notice from the fact that it was the first instance in any State of the impeachment of a judge who had been elected by a popular vote. This was alluded to more than once in the arguments at the trial, and we think few will doubt, but that the improprieties and indiscretions which were the alleged grounds of the impeachment in this case, had their origin in that desire to be popular with, and on the right side of, every voter, which characterizes all candidates for office in the gift of the people, whether judicial or otherwise.

The proceedings preliminary to the impeachment date back as far as the twenty-sixth day of the previous January, when a communication, signed by "a citizen and elector of the State," was addressed to the Assembly then in session, charging Judge Hubbell with "having committed, and being guilty of, high crimes and misdemeanors,

[1] Trial of Impeachment of Levi Hubbell, Judge of the Second Judicial Circuit, by the Senate of the State of Wisconsin, June, 1853. Reported by T. C. Leland. 1 vol. pp. 820. Beniah Brown, Publisher. Madison: 1853.

and malfeasances in office," and with having "so acted in his judicial capacity as to require the interposition of the constitutional power of the Assembly," and demanding an investigation. This communication was referred to a select committee, who were authorized to send for persons and papers, and who on the 23d February reported "at length, with charges and specifications against Judge Hubbell, and recommending his removal from office 'by address' of both Houses, as provided in the Constitution." This report was under consideration for several days, during which the testimony taken before the committee was read in secret session. On the 3d March the Assembly resolved to proceed against the accused by impeachment, instead of by address, and a committee was appointed to prepare the articles "and to impeach him at the bar of the Senate." On the 5th March the committee appeared at the bar of the Senate, and the chairman read the following, which was signed by all the members of the committee.

"In the name of the Assembly and all the People of the State, we impeach Levi Hubbell, Judge of the Second Judicial Circuit, of corrupt conduct and malfeasance in his said office; and the Assembly in due time will exhibit particular articles of impeachment against and make good the same, and we do demand that the Senate take order for the appearance of the said Levi Hubbell, to answer to the said impeachment."

On the 22d March, the Senate resolved itself into a court for the trial of the impeachment. A special oath was administered by the chief clerk to the President, and by him in turn to the Senators, and then the managers on the part of the Assembly presented the articles of impeachment, which were read by one of the managers. There were eleven charges. The first was, that he permitted one Sanderson, a party in the interest of the plaintiffs in a cause pending before him, to consult and advise with him on the subject-matter and proceedings of the said cause; that, while holding the said cause under advisement, he privately and partially informed Sanderson that he had decided the cause, and then solicited and borrowed of Sanderson the sum of two hundred dollars, which sum Sanderson, intending it as a gift, thereupon paid to him, taking from him no voucher or agreement to repay, and charging the same in account to the expenses of the suit; that within two days thereafter, he decided the case in favor of Sanderson; that the said sum remained unpaid for a long time unsecured, and intended as a gift, "until

after the said Hubbell and Sanderson were advised that the said Hubbell was threatened with prosecution before the constitutional tribunal for receiving the said sum of money as a bribe, — when he the said Hubbell gave, and he the said Sanderson received, a due-bill for the said sum of money, which the said Hubbell afterwards, and during the present session of the Legislature of this State, pretended, collusively with the said Sanderson, to pay to him, but which said sum of money was not received by Sanderson, but was by him left with said Hubbell, after the surrender by Hubbell to Sanderson of the said due-bill, and so remains as a gift from said Sanderson in the hands and to the use of the said Hubbell, to the manifest corruption and scandal of the administration of justice."

The second charge was, that while Judge, he, as such Judge, presided and adjudicated in causes wherein he was pecuniarily interested. To this charge there were three specifications, each one setting forth a separate cause, in which Judge Hubbell was alleged to have decided in his own favor, a case therein specifically set forth, in which he was pecuniarily interested.

The third charge, to which there were two specifications, was, that he, as Judge of the second judicial circuit, "has, in the circuit courts thereof, wilfully, arbitrarily, partially and illegally sentenced persons, therein convicted of crime, to punishments different from the punishment prescribed by law."

The fourth charge was, that he presided and adjudicated in causes, in the subject-matter whereof he had been retained and counselled with, and acted as attorney, solicitor, and counsellor. Six specifications accompanied this charge.

The fifth charge, to which there were three specifications, was, that while judge, &c. he "has, contrary to the statute and his duty and obligations as such judge, taken and used moneys paid into the Circuit Court of such circuit, in the progress of suits therein, to the manifest scandal and danger of the administration of justice. One specification set forth that the Judge ordered the sale of certain perishable property, attached in the suit, and that the proceeds should be paid into court, and then took from the sheriff the amount (five hundred and sixty-five dollars) returned by him as the net proceeds of the sale, and kept and used the same until after the final determination of the cause. Another speci-

fication charged him with having ordered, in an equity cause, the amount in controversy to be paid into court; and the same having been paid to the clerk, that he took the same from the clerk and kept it for his own use and benefit until after the final determination of the cause.

The sixth charge, with three specifications, was that he, &c. "has improperly and collusively given judicial advice, and made judicial promises to suitors and persons likely to become suitors in the courts of this State on the subject-matter of their suits, contrary to law," &c.

The seventh charge, to which there were eight specifications, was that he, &c. "has, in the exercise of his judicial functions, conducted himself with undue and unjust partiality and favor to particular suitors in the courts of the said circuit before him," &c.

The eighth charge was, that he "has used his judicial station and influence for the purpose of inducing females to submit themselves to be debauched by him, contrary to public decency," &c. To this charge there were four specifications.

The ninth charge was, that he "has arbitrarily and oppressively exercised the functions of his judicial office, of his own mere will, and out of favor or enmity to the oppression of suitors," &c. There were six specifications to this charge, in one of which the ground of offence was that in a certain case there named, he ordered a new trial without sufficient cause, and without argument heard by him in court; in another, that he refused adequate time for argument by counsel; in a third, that he stayed execution without sufficient cause; in a fourth, that he exacted a certain excessive and unreasonable penalty in an appeal bond; in a fifth, that he quashed an indictment without proper cause, after having previously refused to quash the same; in a sixth, that he "himself gave notice to the complainants' counsel of a motion to dissolve the injunction in a case, and forced such motion to a hearing and decided the same against the complainant without reasonable cause, and without any such motion having been made or noticed by the defendant in the cause, and after having previously refused in the same state of the said cause to dissolve the said injunction."

The tenth charge, to which there were twenty-one specifications, was, that he "has, contrary, &c. allowed himself to be improperly approached, consulted, advised with,

and influenced out of court, on the subject of suits and proceedings instituted or about to be instituted in the Circuit Courts of said circuit, by suitors, their friends and agents."

The eleventh charge was, that he "has, contrary, &c., officiously interfered and intermeddled with, and advised with and advised upon the subject-matter of suits instituted or about to be instituted in the Circuit and Supreme Courts of this State, with suitors, their friends or agents." This charge had thirteen specifications, but in them, as well as in those to the tenth charge, the names of the cases only were set forth, and no allegations of the circumstances of the particular offence in each individual case. Nor do all the specifications to all the charges refer to separate and distinct cases, but the same case is at times referred to in specifications under the different charges.

To these several charges and specifications, Judge Hubbell, by his attorneys, put in the following plea, which was filed on the second of May:

"And the said Levi Hubbell, &c., by, &c., comes here into court, and praying leave of the court to save and reserve to himself the same right of objection to all or any of the foregoing charges or specifications against him preferred by the Honorable the Assembly of the State, which he might or would have in case a demurrer to the same were here filed; and not confessing or admitting either the constitutional right of the Honorable the Assembly in the premises, or the sufficiency in law of any of the said charges and specifications for the purposes intended, says he is not guilty of the said supposed acts of corrupt conduct and malfeasance in office, or any of them above laid to his charge in manner and form as the Honorable the Assembly hath above thereof, in and by the said charges and specifications complained against him."

After the presentation of these articles of impeachment, the committee of the Senate appointed for that purpose reported certain rules of the court for the trial of impeachment, which were adopted by the Senate, and which are given in full. These rules contained the form of summons to the party impeached, and also of a subpœna to witnesses. One of the rules provided that during the trial the doors of the Senate chamber should be kept open.

On the 10th June, the managers put in a replication to the plea of the respondent, alleging that the charges were true, and that the respondent was guilty, in manner and form, &c., "and this the said Assembly are ready to prove against him, at such convenient time and place as the Senate shall appoint for that purpose." On the 13th June, the Senate being at last full, the trial was commenced by E. G. Ryan, Esquire, who had been employed by the mana-

gers as counsel to conduct the prosecution, and who then opened the case in an ingenious and able address of considerable length; after which the testimony on the part of the prosecution was put in, occupying some fourteen or fifteen days.

Two questions were raised at very nearly the commencement of the trial. The first was the merest quibble, and was rejected by an unanimous vote of the court. It was this — that the court had not the constitutional jurisdiction to act upon charges of impeachment prepared by the "*Assembly.*" The Constitution of Wisconsin provides that "the legislative power shall be vested in a Senate and *Assembly*," and that "the court for the trial of impeachment shall be composed of the Senate. The *House of Representatives* shall have the power of impeachment," &c. Because the popular branch of the Legislature in the one case was called the "Assembly," and in the other the "House of Representatives," the respondent contended that the Senate had no jurisdiction. The point made was well answered by a case put by the counsel for the prosecution: "I apprehend the objection would be just as good, that no statute of this State is obligatory upon its people because it had been passed by the lower house, for the reason that that house was called in one part of the Constitution the "House of Representatives," and in all other parts the "Assembly."

Equally untenable and unfounded in law, as shown by the authority cited by the counsel for the prosecution, was the other objection raised by the respondents, which was substantially that a judicial officer cannot be impeached after the expiration of his term of office, for an act done while in office. The respondent had served out one judicial term, had been re-elected, and was in his second term when impeached. He took the ground that the evidence as to corrupt conduct, &c., must be confined to acts done by him since the commencement of his second term. This objection was overruled by a vote of nineteen to five.

A motion was also made very early in the course of the trial by the counsel of the respondent, that the managers on the part of the Assembly furnish the respondent a copy of the evidence taken by the committee of the Assembly and read in secret session. So far as we can see, the motion subsided without any vote being taken upon it. It was opposed by the counsel for the managers.

The trial lasted throughout the month of June, and was closed on the twelfth of July, when the vote was taken. The case was ably and elaborately argued, and at great length. The decision of the court, as pronounced by the President at the end of the balloting, was "that Levi Hubbell, Judge of the Second Judicial Circuit, is hereby declared by this court not guilty of the charges of corrupt conduct in office, nor of crimes and misdemeanors, as charged in the articles and specifications exhibited against him by the Assembly of the State of Wisconsin."

The court consisted of twenty-four senators. Upon the second specification of the fourth charge, the vote stood twelve to twelve; and upon the third specification of the same charge, the vote stood seven to seventeen. Upon the first charge the vote stood ten to fourteen. This latter charge was substantially that of receiving a bribe. The former, in both specifications, was that of presiding and adjudicating as judge in cases in which he had been formerly engaged as counsel. Upon the fourth charge, which was that of presiding and adjudicating as judge in causes in which he was pecuniarily interested, the vote stood upon one specification eight to fifteen, and upon each of the other specifications six to eighteen. Upon the third and fifth charges, upon the sixth charge with the exception of one specification, when the vote stood six to eighteen, upon the eighth, tenth, and eleventh charges, with the exception of one or two specifications, also included in some of the other charges, the vote was substantially unanimous in favor of the respondent. Twelve of the senators voted without change upon every ballot to acquit the respondent. The different results of the various ballotings was owing to the varying votes of the other senators, who appear to have been influenced in a greater or less degree by the testimony which was placed before them.

The result of the trial may be thus stated. Nearly one half of the senators believed that the evidence showed that the respondent was guilty substantially of receiving a bribe; one half of the senators voted that he had acted as judge in causes in which he had been engaged as counsel; one third said that he was guilty of presiding and adjudicating as judge in a cause in which he was pecuniarily interested; and that he had occasionally decided causes with partiality, and from favor or enmity to particular suitors; and one fourth of the senators found him to be

guilty in two specifications under the charge of having "improperly and collusively given judicial advice, and made judicial promises to suitors and persons likely to become suitors in the courts of the State, on the subject-matter of their suits, contrary to law and his duty as judge." Of the charges, that he had taken and used moneys paid into court in the progress of suits; that he had used his judicial station and influence for the purpose of inducing females to submit themselves to be debauched by him; and of most of the specifications of the seventh, ninth, tenth, and eleventh charges, the respondent was unanimously acquitted.

We have no information from which we can give any further analysis of the vote. We do not know the politics of the respondent, nor those of any of the senators. The persistent, united vote of the twelve senators, unchanged by the different evidence in the different charges, may be said to indicate a determined purpose to acquit in any event; but without any knowledge of the political or personal relations between the senators and the respondent, the legitimate conclusion must be, that in their opinion the charges were not proved. The indefiniteness of the terms, corrupt conduct and malfeasance in office, would give a wide latitude to reluctant senators in the formation of their opinions.

It would be alike unprofitable and impossible to attempt, in a brief article like this, to give an abstract of the voluminous evidence introduced at the trial. Still it may not be uninteresting to give some of the testimony in the case, both in explanation of the charges against the respondent, and to illustrate the course of the law in that State; for we suppose that the decision of the Senate authorizes the opinion, either that such transactions as were testified to are usual, and occur in the due course and administration of the law, or that, if existing and occuring, the due course and administration of the law is not prejudiced thereby.

The evidence upon the first charge was the testimony of the William Sanderson named therein. The amount of twenty-one thousand dollars was involved in the suit, in the recovery of which, by the plaintiff, Sanderson was interested. The following are the main portions of Sanderson's testimony.

"I saw and had an interview with Judge Hubbell, on the subject of that suit soon after it was commenced. I saw him here in Madison. I

do not know whether he was holding court here at the time. I did not come here expressly to see him, though I might have thought about it when I came here. When I first saw him I think I asked him if I might see him a few moments, or if he would be at leisure soon. He was at the time in company and in conversation with some gentlemen, and I think he said he would be at leisure about 12 o'clock. I saw him at 12 o'clock at his room, but some persons were present. I called a second time, however; he was then in his room alone.

Q. Did you state to him what the nature of the suit was?

A. How much in detail I spoke of it do not remember. I told him it was a suit brought by attachment, and I might have spoken of some other facts connected with it.

Q. Did you state any thing to him about the position and character of the Comstocks (the defendants) in the city of Milwaukee, and the effect that position might have on the suit?

A. I believe I did. I stated something like this, according to the best of my recollection, that the defendants in the case had formerly resided in the city and bore an excellent character; or something of that nature. I think the Judge said to me in that conversation, that if there was fraud in the case, when we came to the proof he would be able to detect it.

Q. Did you state to him there was any difference between the counsel for the plaintiffs, in regard to the regularity or validity with which that suit was commenced?

A. No, sir: nothing whatever.

Q. Nothing whatever, Mr. Sanderson?

A. No, sir, nothing. To answer your former question, in justice to myself I should say I knew there was a difference among the lawyers as to the proceedings. I did state to Judge Hubbell how the suit was commenced. I did it as well as I knew how, to get upon the scent as nearly as possible as to whether it was commenced right or wrong. I merely stated the fact how the suit was commenced. I did not state the facts upon which the difference of opinion between the counsel was founded. I stated to Judge Hubbell that the suit was commenced by attachment, and that there was a summons issued against Mr. Simmonds and myself. Then the Judge gave me no definite opinion about it.

Q. Between the time when that traverse (of the attachment) was tried before Judge Hubbell and the time when it was decided, did you pay Judge Hubbell any sum of money on any account?

A. Judge Hubbell solicited of me the loan of two hundred dollars for a short time, which I granted. That I should think was as much as two weeks, or perhaps a little more, after the submission of the question to him, and some little time before the decision. To give an explanation of that so as not to appear awkward myself, I would like to preface my statement with a remark. I had some business in Buffalo about some flour which I had shipped down and wished to attend to. I went to New York and to Buffalo and returned, and the question had not yet been decided in court. Immediately after my return from New York, I think the next morning, I met Judge Hubbell coming out of the dining-room at the 'States.' I boarded there, my family being east that summer. When I met the Judge, I shook hands with him and asked him if he had made up his mind about that suit yet. He said he had, and if I would go up to court about such a day I would hear him deliver his opinion. Well, I said, if you have made up your mind about it, have you any objection to let me know what it is? Well, he said, he did not know as he had any objection, and he then told me that he had made up his mind to sustain the attachment, and that the cause was of such a nature that he so decided.

Upon which I said I was very grateful under the circumstances of the case in which I was placed — it got me out of a bad snap. Shortly after this conversation, he said to me that he wished to borrow of me a couple of hundred dollars; that he had a son at the 'States' who was some expense to him, and he also had to pay his schooling; and if I could lend him that sum for a short time, it would suit him very much. I said I could do so just as well as not, and handed him the money. [The witness subsequently stated in regard to the time when the money was borrowed, 'I wish to state it distinctly and plainly, I think it was at that conversation, or during that interview, but I won't be positive about it.']

Q. When you gave the money to Judge Hubbell, did you give it when you were asked for it, or did you procure it? *A.* I procured it soon after.

Q. Did he say any thing about repaying it? *A.* He said he would pay it in a short time. There was no specified time fixed. There was no voucher given and none required. I don't know but the Judge offered to give me something for it; but I took none.

Q. In what account did you charge that money?

A. I did not charge it then, I merely kept a memorandum of it. After a while I credited it to cash, and charged it to the plaintiff in the suit. It was some two or three weeks before I charged it.

Q. Did you then (about the middle of August of that year, the previous conversation being in June,) meet Judge Hubbell?

A. No sir; he had not yet returned from the East. I met him some time after his return, at the 'States,' and he said to me that he was in funds, and was prepared to return me that money. At that time I had charged the money over to Mr. Perry (one of the plaintiffs.) I said to him then that there was no matter about it, and said something from which he might infer that I intended to give it to him — which indeed I had made up my mind to do. He said that if I wished to make him a present of it he should not accept it as such. I said that then I would consider it a loan, and when I wanted it I would call for it. The money was not then paid.

Subsequently, but how long after I cannot say exactly, I found a note in the post-office from Judge Hubbell to me about the money. I called on him at his room. The same day that I received the note I was riding down street, Judge Hubbell called me into his room. I think that was previous to my receiving the note. I think the Judge asked me if I had received his note. I told him I had not. He said he had sent me one to the post-office, because he wished to see me and pay back that two hundred dollars. I think I said then, No matter about it at all. He said, Very well, he wished to pay it: and I think he did go out of the room, and soon returned, saying the person was out whom he expected to see, or something of that kind. I know that I told him that whenever I wanted the money I would call on him, and said that whenever I should get into a tight place I should know that I had a place where I could come and get two hundred dollars. He gave me a note for it payable on demand. That was after the conversation I had with him in the 'States.' It was after his holding court in Waukesha county. It was after I had heard there was a talk about charges being preferred against him.

Q. Do you mean to state, upon your oath, that prior to that conversation and this giving you a note, no mention had been made between you, that charges had been or were about to be preferred against him?

A. No, sir. I do not mean to state any such thing. I mean to state that I have no recollection of any thing being stated.

Q. Prior to that had you heard that transaction of two hundred dollars charged as a transaction of bribery?

A. Now I remember. I think I did hear it charged, while the suit was in progress, that I had corrupted Judge Hubbell. I did not hear that charge as bribery.

Q. How long did that note remain in your possession?

A. Some ten days before the meeting of the Legislature Judge Hubbell sought an interview with me. It took place in his room in the United States Hotel in Milwaukee. No one was present but myself and the Judge. I think the Judge said something like this — he wished to take up that note and pay back that money. I know I said nothing in relation to the money at all. I received the money from him and said nothing about it. I gave him up the note, and in going out of the room I left the money on the chair I sat in in Judge Hubbell's room.

Senator Dunn here put four questions in writing. 1st. Did Judge Hubbell ask you for the money as a loan, or as a gift? *A.* I would like to state the fact as it is for the benefit of all concerned. I had paid counsel twelve hundred dollars, and if I could have thought any such result could have been obtained, I should not have paid so much to counsel. Judge Hubbell borrowed the sum of me as a loan, and expecting it to be paid.

2d. Did he ever propose to you that you should give him two hundred dollars? *A.* He never proposed any thing of the kind.

3d. Was the loan made before or after the decision of the cause referred to him was announced, as you have testified? *A.* It was after the Judge had told me what his decision was in the case, but before the announcement was made in the court, and after this particular conversation.

4th. Did you leave the money in the chair, as testified by you, by any connivance or consent of Judge Hubbell? *A.* I left it there out of my own wish and will.

Senator Stewart submitted the following question.

Where was the Judge at the time you left the money in the chair? *A.* Well, I could show the court the position the Judge occupied, and that I occupied, very nearly, with this gentleman sitting as he does before me. The Judge was writing when I went into his back room: he occupied nearly the position to me that this gentleman does. He turned round from his desk, shook hands with me, said, Excuse me from rising, or something of that kind, and then said that he wished to pay me the money. I laid my hat down on the sofa or lounge, and sat down on a chair nearly back of him. After he paid me the money, when I went out, I picked up my hat, passed the chair I had been sitting in, and laid the money down in it as I passed.

Senator Lewis submitted the following question. Was the money left with his knowledge or consent?

A. It was not with his consent. Whether it was with his knowledge, whether he saw me or not, I do not certainly know, but from the position he occupied I do not think he could have seen me leave it.

A Senator. The witness says the Judge did not see him leave the money: that is not answering whether it was with the Judge's knowledge. *Witness.* I think he had no means of knowing, and I think he did not know that I left it."

This witness was an unwilling and reluctant witness for the prosecution, and was himself in an awkward position. If the senators should find the Judge guilty of any crime, he certainly could not be cleared from complicity in the guilt of the transaction. He was, or pretended to be, for-

getful of dates, especially of those when the conversations concerning the money occurred. Nor could he recollect whether at and prior to the payment of the note Judge Hubbell and he had spoken of the charges preferred or to be preferred against him at the coming session of the Legislature. It also appeared that his memory had been less treacherous, or more exact, before the committee than before the court. The counsel for the prosecution spent much time in attempting to oblige the witness to give exactness and definiteness to his testimony on this point, but with no very satisfactory success. This however was accomplished. We think that any one reading the testimony, will be satisfied that prior to the giving the note, and before its payment, the proposed charges were not only the common conversation of that circuit, and well known to the respondent, but that they were actually the subject of conversation between this witness and the Judge. At the risk of being tedious, we will give the concluding portions of his testimony.

"Q. At the interview between you and Judge Hubbell, when he repaid you the money, have you testified that you and he had conversation together touching that transaction?

A. I think we had conversation after that transaction. We had conversation at different times about it, and about notices in the papers concerning it; and he asked me at one conversation, if you (I) had been subpœnaed out before that fishing committee. I think we had no conversation at that time about my having been accused of bribery. The chair in which I laid the money was four or six feet from the Judge; he was in the larger of his rooms at his desk, and not in the outer narrow room. The desk stood against the south wall, and the door by which I entered the room was behind him. It was in the United States Hotel — as I understand it, it was where Judge Hubbell inhabited at that time — room letter H, I think. We were still conversing as I left the room; I bid him good day. I was standing up, and shook hands with him; I had the money in my left hand, and as I went out, I left it in the chair; I did not observe which way the Judge was looking when I left it; I was with him not to exceed five or ten minutes; I did not count that money when I got it nor when I left it. It was in bank bills. I had some time before heard of charges being preferred against Judge Hubbell. I had not heard the Judge converse about the prospect of charges being preferred against him before that time. I cannot state any thing about the banks from which the bills were issued, or whether the money was current or uncurrent. I made no examination of the money whatever, only to receive it.

Senator Allen asked the following questions: 1st. Had he any knowledge of your intention to make him or his lady a present?

A. So far as my knowledge extends, I know that he did not have any such knowledge.

Q. 2d. Did you call upon Judge Hubbell here in Madison, for the express purpose, and for none other than talking with him about your suit?

A. The leading desire was to talk with him expressly as to that suit; that was the reason I desired this interview.

Q. 3d. Did you, at any time before he took up the note, say to him, that you intended he should keep the money as a gift?

A. I, at no time, said to Judge Hubbell, in so many words, that I intended to give him the money. I did state, as I have already stated, that at the first conversation I had with him, immediately after his return from the east, I did say and convey something from which he inferred that I intended to give him the money, and on which he said he could not receive it as a gift, and that as he had borrowed it he must pay it. I said to him, I did not want it then, and that as he had been to some little expense in getting married, he might keep it, and when I wanted the money I would call on him for it, and then I left the house immediately.

Q. When you received the bills, were they labelled as bank bills usually are?

A. They looked like bank bills just come from the bank, measuring about that amount of money — $200. I did not count them, there might have been more; but I should think as there was two hundred dollars marked on the label, that there was $200.

Q. I wish you to state distinctly, whether, according to the best of your recollection, you ever had any conversation with Judge Hubbell in relation to the preferring of charges against him until the time you mention, when the gentleman informed you of them on the Sunday before the convening of the Legislature.

A. Well, I do not know. The thing started about that time considerably.

Q. Yes, but previous to that conversation, how was it?

A. I do not remember having any conversation previous to that, and that was after I left the money in the chair; I am really sorry I did not take the money away. I now feel that I have done the Judge injustice."

We have said that upon one of the specifications the vote was twelve to twelve. This involved somewhat the merits of the case of William S. Hungerford *v.* Caleb Cushing, an equity suit, in which property to the amount of one hundred and fifty thousand dollars was at stake. Hungerford and others had conveyed certain lands on or near the St. Croix river, the title to which was in the United States, to Cushing, upon certain trusts. For the alleged non-performance of these trusts, the bill was filed praying for a re-conveyance and an account. While the bill was pending the lands came into the market, and Hungerford applied for and obtained a preëmption to them. To procure a patent on his preëmption he was obliged by law to take an oath in substance that, at the time of taking the oath, he had made no agreement or contract whereby the title he should acquire from the United States could inure to the benefit of any other persons. He did take this oath while the deed to Cushing was outstanding and uncancelled. For perjury in taking this oath, Hungerford was indicted in the Federal Courts. The question in Hungerford and Cushing was, whether the respondent had performed the trusts and had any title to the lands; if he had, it would follow that, at the time the oath was taken by Hungerford, there was some outstanding agreement or contract, whereby

the title he should acquire from the United States would inure to some person other than himself, and consequently that his oath was false. Substantially, then, the same point was involved in the suit in equity and in the indictment. Judge Hubbell, in the equity suit, made a decree in favor of the complainant, from which an appeal was taken to the Supreme Court, then composed of the Judges of the Circuit Court. After this decree, and while the appeal was pending, Judge Hubbell was spoken to by Hungerford's counsel for his opinion upon the points made in a motion to quash the indictment for perjury. Judge Hubbell himself made this admission to the court of impeachment: "I told him I was an attorney and counsellor in that court, and if my opinion was wanted I must be paid for it. He then replied in substance that he was glad to hear it, as he thought Mr. Hungerford would like to have my services in Milwaukee. He, Mr. Hungerford, or one of them, saw me again, and I told him or them, I would examine the case and give my opinion on the points, or would engage to assist in the argument for one hundred dollars. This was agreed upon between us." In pursuance of this agreement consultations were had, and the money was paid. The indictment in the Federal Courts fell through, there being technical difficulties in the way of sustaining it. After being thus employed and paid by Hungerford, Judge Hubbell, in the Supreme Court, sat as judge upon the appeal in Hungerford and Cushing, and it was upon the charge founded upon this act of his, that the vote of the court was equally divided.

Certain acts and sayings of Judge Hubbell, during the course of the proceedings in the equity suit, were brought against him as evidence of undue partiality and arbitrary and oppressive conduct. One of these acts was ordering the cause to be argued at an unexpected time, and also not allowing sufficient time for the argument. The testimony of one of the counsel for the defendants in that suit was as follows:

"*Q.* Do you recollect the time when the decree was made? *A.* I do; it was in June, 1851.

Q. Will you state to the court how that term came to be had, and as much as you know about the holding of that court and making that decree?

A. Some time in the month of May previous, I received a notice from one of the solicitors of the complainant that a special term would be holden at the June or July term in the Supreme Court, in which that cause would be brought on. I consequently informed my clients of the fact, and Mr. Rantoul and Mr. Green came on here to defend the suit. We waited here, as near as I can recollect, about a fortnight for the hearing of the case; nothing, however, was done in the matter, and finally Mr. Rantoul and Mr. Green left for the east, having received information that the cause would not be heard. I returned to Janesville, and on the 22d July I received a telegraphic dispatch from Judge Hubbell that I must return to

Madison and argue that case. I did return, and at that time I found Mr. Hungerford, the complainant, here; when I left he was not here. I then endeavored to get the cause put over to the Fall term, arguing that there would be no time lost by it as the cause must go to the Supreme Court: but the argument was insisted on, and during the conversation which I had with Judge Hubbell, I stated that it would take a week to argue that case. The remark he made in reply was, that he would not hear an argument in the case exceeding an hour. I remarked that I would not argue the case then at all, and I entered into a stipulation to submit the case without argument; and on the 25th July a decree was made which changed the property from my client to the complainant, Mr. Hungerford.

Q. What time would it reasonably take to read the papers in that cause? *A.* I should think no man, being occupied during the ordinary hours of labor, could read them through in less than three days, taking the bills and answers without the proofs."

The same witness, referring to some of the proceedings in the case, also stated in his testimony,

"I was arguing the exceptions to a particular part of the answer, and Judge Hubbell stopped me in the argument, and put this question to me: 'Mr. Smith, do you call that an answer to this bill?' My answer was, 'I do.' His reply was, 'It is not an answer to the bill, and I am satisfied that General Cushing cannot make an answer to it. I believe the thing is fraud from beginning to end.' That is the way the thing came up, and that is the language precisely as nearly as I can recollect it.'

Q. Do you recollect a remark of the Judge, that in case Mr. Cushing failed to make a complete answer, it was quite immaterial whether his understrappers could or not? *A.* I recollect something of that kind. When Mr. Rantoul's answer was overruled, he did make the remark you have mentioned — that it was immaterial — since Mr. Cushing could not answer, it was no matter whether his understrappers could or not.

Q. Was it not to that remark that you replied that he had prejudged the case? *A.* No, sir; that was a different affair."

It was also objected that Judge Hubbell required the unreasonable penalty of $10,000 in the appeal bond in that cause. The witness who procured the order fixing the amount, testified as to the following statement of the Judge: "Then he said something to this effect; that that was the way things went; that he had beeen more the friend of Mr. Cushing than Mr. Hungerford; that if they continued the suit longer they had got to fish or cut bait, and that if Judge Miller went on with that suit he would enjoin it." Judge Miller was the Judge of the United States District Court. Another statement of the witness shows what we should consider a peculiarity in intercourse with judges in this section of the country. "When I went to see Judge Hubbell he was shut up in his office writing out some decision I suppose. I pounded away at the door below for some time. He told me I could not get in. I told him I should, as I had a matter of business that must be attended to immediately."

We add the testimony of another witness, as a sample of the evidence introduced to sustain the charge of partiality and impure

conduct. It is the testimony of a Mrs. Howe, who was offered as a witness by the respondent. She was speaking of an interview between herself and Judge Hubbell, and in reply to a question as to the object of the interview, testified as follows:

"It was in consequence of the decision of a jury on a note that Mr. Howe was sued for. Mr. Simpson was plaintiff in that suit.

Q. Now what was there in that verdict that Mr. Howe was dissatisfied with?

A. Previous to the note being sued, it was left in Milwaukee, in the hands of Mr. Byron, as security for a stove. Mr. Byron wrote to Mr. Howe that he had such a note in his hands, and wished he would pay it. Mr. Howe went into Milwaukee to make some indorsements on the note, and went to Judge Hubbell and asked him if these indorsements were valid. He said they were. He made the indorsements, and the next week sent in the money to pay the rest. Mr. Simpson objected to them, and said the indorsements were not good. He sued the note then, to collect the indorsements, and when it came before the court, one indorsement was run through by a pencil mark. That indorsement was forty dollars. The jury decided to throw away those indorsements in consequence of that pencil mark. The Judge instructed the jury to take the note as it was. One of the jurymen said they supposed he meant to have them throw away the indorsement, it being marked out. Mr. Howe was indignant. He thought the Judge was wrong in the matter and was prejudiced. He was going to Milwaukee after the decision, and I was going with him. We stopped at Jones' Hotel, in Waukesha. I told Mr. Howe I would see the Judge. I did not want to lose the money, and if he was prejudiced I would speak to him about it. He said that he would not see him, but I could do as I pleased. I told Mr. Holliday I wanted to see the Judge on business, and told him what that business was. The parlor was occupied by Mrs Jones and the family. There was but one parlor in the house. Mr. Holliday came up to our room and asked me if I had seen the Judge. I told him I had not. He said he would give me an opportunity in his room. He went down, got a light, came to the door, and said, 'Come with me.' I went to a room, I supposed it was Mr. Holliday's. He went to the next door, called the Judge, and the Judge came in. I stated the case to him about the note and the indorsements. He said he remembered them, but he did not before, about the indorsements. He said the indorsements were valid and should not have been thrown away, and he did not see that they were marked out. He said he was sorry, and thought Mr. Howe ought to have had the indorsements allowed him. I told him I thought we ought to have a new trial. He afterwards granted a new trial by putting these indorsements before the court.

Q. How long did that interview last?

A. From five to seven minutes I should think, but I cannot state exactly.

Q. Do you recollect any one coming to the door while you were there?

A. Yes, sir. Mr. Finch came to the door. I do not know whether he rapped or not. He came in; Judge Hubbell met him at or near the door. He came in and bowed. Judge Hubbell says, 'Walk in Mr. Finch — Mrs. Howe.' Mr. Finch then backed back again and bowed, and Judge Hubbell said, 'Walk in Mr. Finch, take a seat — there is nothing private here.' But he refused, and with his finger in his mouth he bowed out of the room insinuatingly, and said, 'Ah! ah!'

Q. How soon after that did Judge Hubbell leave the room?

A. I do not think I set down again. I thought perhaps I was intruding, and perhaps left in two or three minutes.

Q. Was your conversation with Judge Hubbell at this time in regard to any other suit except this suit of Simpson. *A.* No, sir."

Cross Examination. "*Q.* Why did you go into that room, and not into the Judge's own room? *A.* I obeyed Mr. Holliday's advice. I had no choice of room myself. *Q.* Was the room where you were a bedroom? *A.* Yes sir. *Q.* Where did you sit in that room? *A.* I sat in a chair. *Q.* Did you sit upon the bed any part of the time? *A.* I do not recollect distinctly whether I did or not. *Q.* When you first went into the room where did you sit? *A.* In a chair. I arose when Mr. Finch came in; and whether I then sat down on the side of the bed or not I do not recollect. *Q.* Do you recollect, Mrs. Howe, of telling any one that at that interview with Judge Hubbell you used some such language as this to him — 'Business first, Judge, and pleasure afterwards'? *A.* No, sir. . . . . *Q.* Did you in fact use any such language to Judge Hubbell? *A.* I told the Judge I had come to see him on business. He put his arm around me and playfully remarked, 'How small you are, Mrs. Howe!' I said, 'Judge, you must treat me gentlemanly.' He said he had no intention of doing otherwise. I don't think I did use such an expression, though I might have done so; I say a great many curious things, but I don't think I said that."

Direct Resumed. "*Q.* In regard to having the interview in the room which you did use, was that entirely at Mr. Holliday's suggestion? *A.* Yes, sir.

Q. What reason did he assign? *A.* He told me he would not speak of any business matter before Mrs. Jones.

Q. Had Judge Hubbell any thing to do in making the arrangement? *A.* No, sir. I do not think Judge Hubbell knew who was in the room when he was called to see me.

Q. Will you now state to the court, Mrs. Howe, whether, in your interview in that room, Judge Hubbell made to you any indecent proposition? *A.* Not at all.

Q. Nor any proposition of any kind connected with that suit? *A.* Not the first.

Judge Hubbell. Mrs. Howe, I want to ask you to state, upon your oath, whether, in any place, or any where, or ever, any familiarity of conduct whatever was offered by me to you. *A.* We never had an interview alone excepting that one time, and have never passed three words together alone since, excepting, perhaps, the time o'day in the street.

Q. Have you stated the whole truth in this matter? *A.* I have."

"*Mr. Ryan.* You stated to Mr. Arnold, that at that interview between you and Judge Hubbell, he made no indecent proposition to you. Did you consider his putting his arm around you as no indecent proposition? *A.* No, sir. For I resisted it. I did not consider it an indecent proposition.

Q. What did you consider it? *A.* Just as it was. My view was that it did not amount to any thing.

Q. What then was the meaning of your saying to him, that you came there upon business, and that you expected that he would treat you gentlemanly? *A.* Oh, just for a guard, in case he might make an ungentlemanly proposition.

Q. What put it into your head that he might make such a proposition? *A.* Oh! human nature. (Laughter.)

Sergeant-at-Arms. Silence in court. (Great laughter.)"

The defence was conducted by James H. Knowlton and J. E.

Arnold, Esquires. Judge Hubbell also took part in the examination of witnesses, and in the arguments to the court upon incidental questions, occasionally exhibiting considerable feeling. He also, after the prosecution had closed their arguments, briefly addressed the court. The legal grounds assumed by the defendant were three. 1st. The acts charged must be wrongful, illegal, or unconstitutional. 2d. Those acts must be clearly proved. 3d. They must have been done with a bad or guilty motive to make them corrupt conduct in office, or crimes and misdemeanors. The greatest reliance was placed upon the last point. We give below some portions of the arguments for the defence, and would call especial attention to what is said in reference to the effect, both upon the judge and the people of the experiment of electing judges by the people. Mr. Knowlton says:

"I say no judge in this State can possibly get along without being approached by suitors, and made liable to be charged with having interfered and advised in matters of suits. The judicial system under which we live is the "Elective System," and *that* is calculated to bring the judge upon a level with his fellow-men. They calculate they have a right to confer with him upon the subject of their suits as well as upon other matters."

Mr. Arnold, in his concluding argument, speaks of "the elective system of the judiciary" as "a blow aimed at the independence of the judges, because it makes them responsible directly to the people." He also said:

"These accusations against the respondent are mainly in relation to too great freedom of conversation, and of conduct towards parties and suitors. Now in the case at bar there may be an explanation, and a very proper one for me to suggest and urge upon you, an explanation of a great deal of this conduct, which has been in proof with regard to the defendant. Some of it, I think, may be imputed justly to our judiciary system — to the elective system. It is a system which makes the judge more or less dependent upon the people. He looks to them for his office; and how naturally will poor, imperfect, human nature yield to its influences. How natural, that he should be disposed, on all proper occasions, to conciliate the favor of the people; not, perhaps, by positive prostitution of his office, not by corrupt conduct in office, but in a free, frank and friendly intercourse with his fellow-citizens. It is naturally incidental to the very elective system, that we have to encourage intercourse with free, friendly and conciliatory terms between the judge and the people of his circuit. But again, and of more importance in this case, I attach great importance to the peculiar composition and character of the respondent, in accounting for all these facts, which have been in proof instances of imprudence and indiscretion, and that is all — that is the sum and substance of the whole proof here — a series of indiscretions and imprudences. Now, human beings are not all alike — one man has a cold, phlegmatic temper — has a misanthropic and dignified disposition, and perhaps avoids association with his fellow-men — he lives within himself. Such a man would pursue one course of conduct; another man, and such is the respondent at the bar, is of a frank, open, communicative, confiding, gener-

ous nature — fond of his friends — fond of society — fond of conversation — naturally inclined to be polite — always ready to act the gentleman in his intercourse with his fellows. These are the characteristics of the respondent, and they account, in my humble judgment, for a great portion of the facts which have transpired here in proof. Should a friend in the humblest Irishman who walks the streets of Milwaukee, arrest him and ask him what he could do with this and that difficulty, he would not spurn him, and say, Get away from me. I am going to hold court; and put himself upon his dignity.

I have seen him stop a thousand times, and talk with such men as he would do with men of the highest rank. Politeness always does that. It is the rule of his conduct; and when he has been overpressed with business, I have known him to take a round-about way to the court-room to get rid of these repeated solicitations that would meet him on his daily walk. Such is the character of the man. He does not feel bound, perhaps, even when improperly solicited, to cut a friend adrift. He does not say — Sir, I am Judge: your conduct and conversation may improperly influence me — I'll have nothing to say to you. On the contrary, he says — This man does not know any better; he does not seek to corrupt me; and no matter if he does, he cannot do it. I will, in politeness, hear his story, and will pass him off unoffendingly. And so he hears his story; gives him some advice perhaps, and, perhaps, sends him off to a lawyer."

Another circumstance — and it is an important one — for you are to arrive at the truth of the facts set forth, and at the guilty intention with which they were done. His conduct was submitted to the scrutiny of the people at the last judicial election. Then his acts were investigated, amidst the highest degree of excitement, in one of the most exciting elections that ever transpired. They were canvassed in the bar-rooms, in the streets, in the public press, almost in the very churches—every where these matters were subjects of public discussion, and his conduct was arraigned by an impeachment conducted not quite so calmly as this one is. All the passions of human nature were enlisted in the election, and yet when the public came to pass upon the matter, and his conduct came to be thus investigated, he was indorsed by a triumphant majority of the people of his circuit. I think the proof strong that the impeachment does not proceed from the people, although the people's name is used in this prosecution. The parties and suitors in his court never found fault with him, and never appeared against him. They never came here to get up this impeachment. They were satisfied with him, and the people of the circuit, who have just indorsed him by a re-election, are satisfied with him. Who is dissatisfied with him? Who wants to impeach him? What has been the motive of this prosecution? I say it is not truly alleged to be in the name of the people of the second judicial circuit. He has been there impeached and they voted down the impeachment. They have indorsed him, and put him again upon the bench. Where this prosecution was gotten up, I know not and care not. I only know that it is seeking to drive him from his position bestowed upon him by the people."

We make room also for the greater part of Judge Hubbell's closing remarks.

"Mr. President: It is the right, a right which I acknowledge, on the part of the prosecution, to close the argument in this case. My counsel in this case have made such remarks to the court as they deemed proper; but by a peculiar arrangement, which was without my concurrence, and contrary to what I supposed to be the rule, the prosecution was allowed their entire summing-up after my counsel had closed. This induces me,

nay, impels me, to ask, for a few moments only, the indulgence of this Senate, not to make an argument, but to make a few remarks; not to close the case, for I admit the right of the Honorable the Assembly to reply to whatever I may say. Have I, sir, that permission of this Honorable Court?

The President. If there are no objections, permission is granted.

Several Senators. Go on! go on!

Judge Hubbell. Mr. President, I have retained my position here, so far as more imperious duties, in another quarter, would permit me, and have listened with all the quietness and with all the decorum which I could command, to the remarks of the gentleman who represents the managing committee and the honorable the Assembly of the State. I have permitted myself, my motives, my character, my conduct, my head and heart, to be assailed and impugned, in all the forms which language could invent, in a manner in which no felon confined in our State prisons has ever endured, no malefactor that ever swung upon a gallows has ever deserved. I have done it, because I was conscious of my position here, because of my respect for the laws of the land, because of my homage for this honorable court, in whose presence I sit, with the manacles of the law upon me.

Mr. President, I have said, and I beg leave to repeat, that I have not shunned this investigation, even in the shape in which it comes. I do not shun a judgment upon the testimony in this case and upon the law. The testimony as it is delivered here, even that testimony, raked up from the mist of by-gone years, from transactions embracing the decision of thousands of cases on trial or argument — from the hurry-skurry of business pressing me from county to county and from court to court, from the midst of friends and suitors, forcing themselves and their clients into my presence whether I would or not — upon that testimony, imperfect and broken as it is, discolored and distorted as it has been, I do not shun the judgment of this court, nor the judgment of posterity.

Nor upon the law do I seek to shun judgment — the law, Mr. President, to which you are sworn; the law which has been scouted at before this court; the law of the land, the law which this court has sworn to obey, and which I have called God to witness that I would obey to the best of my humble ability and capacity — the Constitution of the State, that is the law; the Constitution, which prescribes the subject-matter of impeachment; the Constitution of the State, which is the palladium of the liberty of the people whom the counsel represents; the Constitution of the State, which is the shield and ægis of the judge upon the bench, as well as the humble respondent who stands at your bar; the Constitution of the State, which was, when I was acting in the name and power of the people, and which is now, that I am arraigned by the people, my ægis, and your ægis — in the name of the people, and by that law, I am content to be judged. But, sir, my reason, my judgment, revolts at the assumption which has been made here, in the name of the people of this State, that there is no law for this court to pass upon — that there is no capacity in this court to pass upon any law — that the Assembly of the State not only is the maker of the law, but the judge of the law — and that this court is, in the language of the learned prosecutor, only a 'great political jury.' And what, sir, is a jury? What is the humblest petit jury, that ever sat in any criminal case, in our land or in England? What are the rights and what are the powers of a jury, as known to the common law? The right and power, and duty, to decide upon the law and the fact; — a power which is denied here, and denied with a boldness, sir, which even Lord Mansfield himself, in the trial of the Woodfall libel case, did not dare to assume on behalf of the Crown of England. This 'jury' is to find simply

the fact, whether this or that act was committed; and somewhere else, in the Assembly of the State, in the committee of managers for the Assembly, or perhaps in the counsel who acts for the committee of managers, resides the law, and the judgment of the law — yes, and the power of manufacturing the law that governs a case of impeachment of the highest judicial officer in the State. I admit no such law to be my criterion or your criterion of judgment."

"You have been told, sir, that this proceeding would go down to posterity. So it will, Mr. President. So it will. There has been a movement and an agitation of the State for six months. The whole power of the State has been exercised, all the constitutional authorities of the State have been occupied. The results of their labor are before you. All the testimony on file in this case, all the speeches of the counsel, all the proceedings in the case are to be published in a volume of thousands of pages. They are to be read by the world as they are. They are to be read by my children, and yours, and by all of posterity who choose.

Mr. President, when this poor head has done its work, when this humble form shall have gone to sleep beneath the quiet sods of the valley, where "the wicked cease from troubling and the weary are at rest," when your children and mine walk with grey heads about this capitol, they will find in the seats of this temple of justice, men of uprightness of character, of intelligence of mind, of patriotism of heart, who, upon that testimony, despite the speech of the counsel which will travel to posterity with it, will vindicate my character, and wipe the stain from my name. And you will then find men here, honorable men, whose voices will make the arches of this capitol ring with their own comments, with their own expressions of surprise, with their own expressions of indignation at the spirit which, in the name of the State, using the sovereignty of the State, has poured out the bitter personal malice of one single bosom upon the devoted head of the respondent. Be the result of this trial as it may, now; be my condition in the judgment of this court as it may; whether it be true or not that the prosecution can command spirits; I tell you, Mr. President, that when this testimony and that speech, and the judgment of this court go forth to the world, angels will come and sit beside me, wherever I may be in this State, thick as the leaves that clothe the green forests of this our free land. The people of this State, of all parties, men and women, who have met me, who have known me, and who have experienced what I am, and know what I am and just what I am, will, like good angels, welcome me to their hearth-stones, and invite me to sit down with them, and enjoy a peace which I never felt in my station as Judge.

Mr. President, I am nearly done. I beg pardon of this court. I have said too much, and said what I did not intend to say. I will speak of the testimony on one or two points only. In the Kane case, I am charged with having presided and adjudicated, contrary to the statutes of 1848 and 1850, upon a case in which I had been employed as counsel. You will bear in mind, and the court will bear in mind, that Kane swore positively that I never was his attorney. Judge Whiton swears positively that I never presided in that case until Kane was the sole party in it. It might well be, that, where the testimony of the prosecution and of the defence stand together so positively, no suspicion of improper motive could be raised, when there is no evidence whatever of any inducement to commit crime.

But, Mr. President, the prosecution represented by its embodiment, the counsel here has started with one position which shocks and astonishes me more than any position I ever knew assumed in any criminal case. It is, that the respondent in this case, from the beginning, when he went

upon the bench and before, was filled by nature with corruption and impurity, and that every hour since, he has continued to be filled with corruption and impurity; and the testimony, which has been commented upon, and the whole prosecution conducted on this assumption — they have sought not to prove guilt, but only to show some loop, some word or action, as it were some leak-hole in my nature, through which this inbred, overflowing corruption, was constantly tending to run. I claim not infallibility or perfection; but I claim, and that not arrogantly, what we give to every criminal, in every case of prosecution, the presumption of good intent until a bad one is shown. I claim most sincerely and solemnly to have acted with pure and proper motives throughout my whole judicial life and conduct. I claim it in the Sanderson case. I claim it in the Kane case. I claim it in every other case presented to this court. I know that I am entitled to the presumption of innocence, and I know that this Honorable Court, some of whom have been judges and magistrates, will give it to me, because the law gives it to me."

"I have now done. I have detained the honorable court longer than I intended. I have said, Mr. President, that there has been a movement, an unusual and extraordinary movement of the official powers of this State in this case. I trust in God, that this movement, which here had its beginning, will here also have its end. I trust this experiment will be the last. When the verdict and judgment of this court go out to the world, and when the people of this State are called upon to pay one hundred thousand dollars or more to meet the expenses of this proceeding, I hope they will be satisfied with the judgment, and feel that this prosecution was warranted and required by stern necessity. I hope that that judgment, whether or not it be satisfactory to the parties who have moved for it — whether or not it be satisfactory to the honorable the Assembly, or to the honorable the committee who sit here for the Assembly, or to the distinguished embodiment of them all, who gloried in the opportunity to lead and speak in the name and in behalf of the State — I trust that such will be the judgment of this court, as to satisfy the consciences of the honorable men who summoned me, such as to satisfy the people, whose name has been used to sanctify this impeachment, and such as to satisfy posterity, that it has been, both in its beginning and in its end, the work of public justice, and not the work of private malice or of a diseased imagination."

Recent American Decisions.

Supreme Judicial Court of Massachusetts, March Term, 1854.

THEODORE FISHER *v.* PATRICK MCGIRR ET AL.

Constitutional Law — The 14th Section of the Liquor Law held to be Unconstitutional.

One part of a statute may be declared valid, and another part of the same statute be declared void.

The proceedings under the provisions of the Liquor Law, so called, whether they are by a process *in rem* for the sequestration and forfeiture of the

property, or by a process *in personam* for the punishment of the person of the offender, are designed for the enforcement of the criminal law, and must be governed by the rules applicable to its administration.

The measures authorized and directed by the 14th section of the Act known as the Liquor Law, are a violation of the article of the Declaration of Rights respecting general warrants and unreasonable searches, and the section is therefore unconstitutional and void;

Because, neither in the complaint nor in the warrant, is any person affected, even by way of suspicion or belief, of the unlawful act of keeping intoxicating liquors for sale;

Because the officer's authority and right of seizure are not limited to the articles described by quantity, quality, or marks, nor to liquors kept and intended to be sold;

Because the authority to seize is carried greatly beyond the articles the possession of which is made unlawful, and the keeping of which is intended to be treated by the Act as a nuisance;

And because it may be an interference with the regulation of foreign commerce, which is placed under the exclusive jurisdiction of the Constitution of the United States.

The said section is also unconstitutional and void, because many of the precautions and safeguards for the security of persons and property prescribed by the Declaration of Rights, are overlooked and disregarded, in this, —

That under these proceedings property may be confiscated and destroyed without any opportunity being given the true owner to appear and defend;

That no provision is made for a determination, by judicial proofs, of the facts, upon the truth of which alone the property can be justly confiscated and destroyed;

That a judgment for a penalty and costs may be rendered against a man who has never had notice of any process pending against him.

This section of the statute, so far as it directs proceedings *in personam*, is unconstitutional and void, because, considered as a charge of crime or offence, there is no provision for an indictment, information or complaint, on oath or otherwise, in which the specific offence of keeping or depositing spirituous liquors intended for sale, is in any way described, so that it can be put on record and traversed, or an issue thereon be joined in due course of law.

This section of the law being void, the magistrates had thereby no jurisdiction and authority to issue the search-warrants, and the officer consequently not being able to justify the seizure under it, an action lies against him for the taking.

This case comes before this court on an appeal from a judgment of the Court of Common Pleas, upon an agreed statement of facts entered into by the parties. It was an action of tort, commenced in that court, in the nature of an action of trespass, for forcibly entering the plaintiff's dwelling-house and carrying away a quantity of brandy and other spirituous liquors, with the barrels, demijohns, jugs and bottles in which it was contained. The defendants justify the entering of the plaintiff's dwelling-house and the seizure and removal of the liquors, under a search-warrant issued by a Justice of the Peace for the

county of Barnstable, and committed to McGirr for service as a constable of Sandwich. The complaint on which the warrant issued, the search-warrant, the return of the officer thereon, and the proceedings of the magistrate, amongst other things, ordering the destruction of said liquors, pursuant to the statute of 1852, c. 322, concerning the manufacture and sale of spirituous and intoxicating liquors, are all made part of the answer.

Many exceptions were taken to the course of proceeding under the act, but the one which surpasses all others in importance, and which if well taken supersedes all others, is, that all that part of the statute directing the seizure and confiscation of liquors kept or deposited for sale, is unconstitutional and void. We suppose the principle is now well understood, that where a statute has been passed by the Legislature under all the forms and sanctions requisite to the making of laws, but some part of which is not within the competency of legislative power, or is repugnant to any provision of the Constitution, such part thereof will be adjudged void and of no avail, whilst all other parts of the act, not obnoxious to the same objection, will be held valid, and have the force of law. There is nothing inconsistent, therefore, in declaring any part of the same statute valid, and another part void.

Many questions have heretofore arisen upon various points, on the construction of this statute; but this is the first instance wherein any question has come up in this court upon the constitutionality of the fourteenth section of the act, being the one under which these proceedings were had. As it was a question of much general interest and importance, the court reserved the case, especially as they understood that the same question was pending in other counties, and would probably soon be argued. Other cases have since been brought up and argued.

Passing over, for the present, all the minor exceptions to the regularity of these proceedings, we are brought to consider what is the true construction and legal effect of the fourteenth section of this act, and then, whether these provisions, correctly construed, are contrary to the Declaration of Rights and the Constitution of this Commonwealth, either in their principle, or in the mode in which they are to be carried into execution.

The section is long and complicated, and it is not easy in every instance to ascertain what was intended. It is

nowhere provided in this section, or in any other part of the statute, in direct terms, that the keeping or having liquor deposited for sale, shall be in itself unlawful, and render the property liable to confiscation, or subject the owner, agent or other depositary, to a penalty therefor. It rather results by implication from other provisions, and the general tenor of this section. The first part of this section directs, that if any three persons, voters, &c., shall make complaint, under oath or affirmation, before any justice, &c., that they have reason to believe, and do believe, that spirituous or intoxicating liquors are kept, or deposited and intended for sale, by any person not authorized, &c., in any store, &c., or in any building or place in said city or town, said justice or judge shall issue his warrant of search, to any sheriff, &c., who shall proceed to search the premises described in said warrant. Several suggestions arise upon this passage. The complaint is not required to allege that any person in particular has the articles, kept or deposited, nor whose intention to sell them it is which renders the keeping unlawful, and subjects the property to seizure and confiscation. We presume from the context and the purpose of the enactment, that it must mean the intention of the owner, or his agent, servant, or some person having it in his power to make a sale *de facto*, thereby to make the mischievous use of it which is intended to be prohibited.

Again, by the collocation of the terms in this sentence, it is a little doubtful whether the words, "in said city or town," designate the place within which the liquors are kept, or qualify the intent to sell them within such city or town in order to make the keeping them unlawful; perhaps both are intended. The former would seem to be intended, to bring them within the jurisdiction of the local magistrates and officers; and unless so kept, with an intent that said liquor should be sold within such city or town, it would make the keeping of liquors unlawful, although intended for sale in another State or foreign country, which we suppose the Legislature could not have intended. It is to be regretted, that in so important a provision the language should not have been more explicit and free from doubt.

It is obvious, we think, that the complainants are not required, and have no express authority by the act, to state the names of the persons by whom the liquors are

kept; and, as the warrant follows the complaint, the justice is not required, by the statute, to name such person; and if practically the name is usually mentioned, it is probably done as one mode of identifying or describing the place where the liquors are alleged to be kept, as the house or shop of A. B., in —— Street, &c. The clause goes on — "and if any spirituous or intoxicating liquors are found therein (the premises described), he (the officer) shall seize the same, and convey them to some proper place of security, where he shall keep them until final action shall be had thereon; and such liquors so seized, together with the implements of the traffic, shall be used in evidence against any person charged with the unlawful manufacture or sale of spirituous or intoxicating liquors." From this last clause we might be led to imply that if such liquors were found, it was intended that a new and substantial complaint should be filed, upon the trial of which this should be evidence. But, in its terms, they are not to be used as evidence of an unlawful keeping with intent to sell, but as evidence upon a charge of actual unlawful manufacture or sale. The statute does not, therefore, by implication, direct or provide for a new complaint for an unlawful keeping with intent to sell.

Again, in the same passage, when the complainants have stated their belief, that liquors intended for sale are kept in a place designated, and a warrant is issued to an officer to search such place, the law requires — and we presume the warrant would necessarily follow it — not that he shall seize certain liquors described, or in more general terms, any liquors so kept or deposited for sale, but, "if any spirituous or intoxicating liquors are found therein, he shall seize the same." The intent of the Legislature seems to have been, that all spirituous liquors found in such place shall be taken into the custody of the law, leaving the question whether any or all of them were kept for sale, or lawfully kept, to be decided afterwards.

The section contains a provision for a more special complaint, to warrant the search of a dwelling-house; and then goes on to direct the proceedings: "The owner or keeper of said liquors, seized as aforesaid, if he shall be known to the officer seizing the same, shall be summoned forthwith before the justice or judge by whose warrant the liquors were seized; and if he fail to appear, or unless he shall prove that said liquors are imported, &c., or are kept for

sale by authority derived under this act, or are otherwise lawfully kept, they shall be declared forfeited, and shall be destroyed, &c., and the owner or keeper of said liquors shall pay a fine of $20, and costs, or stand committed, &c., if in the opinion of said court said liquors shall have been kept or deposited for sale contrary to the provisions of this act."

It may be remarked upon this part of the act, that the first time any mention is made of the owner or keeper, is upon the seizure of the liquors; then, upon the contingency that he is known to the officer, he is to be summoned, and if he fail to appear, or unless he can make certain proofs, &c. the liquors are to be destroyed, and he is to be punished. The purpose for which he is summoned seems to be, to inform him of the seizure of the goods, and enable him to prove them not liable to forfeiture.

Sect. 15 provides, that "If the owner, keeper, or possessor of liquors, seized under the provisions of this act, shall be unknown to the officer seizing the same, they shall not be condemned and destroyed, until they shall have been advertised, with the number and description of the packages, as near as may be, for two weeks, by posting up a written description of the same in some public place, that if such liquors are actually the property of any city or town," &c., "or the property of some person duly authorized to manufacture and sell such liquors under this act, and were lawfully in his possession at the time of such seizure, or were otherwise lawfully kept, they may not be destroyed." The notice is in effect not to any person in particular, or to any person in whose possession the liquors were found; but the purpose of the notice, as declared by the act, is, that "upon satisfactory proof of such ownership or lawful possession within said two weeks," the justice may make an order to deliver them up. The purpose of the notice seems to be, to enable any person to appear and offer such proof, who may have any interest, in obtaining a discharge of the property upon any of the grounds aforesaid.

Sect. 16 directs what proceedings shall be had in case an owner or keeper of liquors seized as aforesaid shall appeal.

These are all the provisions of the act, on the subject of the seizure of spirituous liquors, kept for sale; they, together, constitute a system of proceedings, and it seemed

necessary to consider this system as a whole, in order to a better understanding of its legal and constitutional character.

We think it manifest that the Legislature, in this system of measures, proposes to accomplish one and the same object, by two distinct modes of proceeding. The general purpose is, to prevent or diminish the evils of intemperance, by the punishment of an indiscriminate sale of spirituous liquors; but the particular purpose in this series of measures is, to prevent such liquors from being kept in any place, by any person, for the purpose, or with the intent, that they shall be sold. Although crimes and offences punishable by law, consist in acts done and not in mere unexecuted purposes and intentions, yet the more effectually to accomplish the great and salutary purpose of laws necessary to the well-being of society, acts and conduct, which would be innocent and indifferent in themselves, are often declared unlawful, and made punishable, if done with an intent and purpose, which will render them noxious or dangerous, and where, should the law wait till the criminal intent is carried out into action, irremediable mischief would be done. The law is preventive as well as remedial. Thus, a person may innocently have in his possession counterfeit coin or bank notes; but if he has them in his possession with intent to pass them as true, knowing them to be counterfeit, the intention qualifies the act, and such act may be justly made punishable. This is the foundation of many criminal enactments. The principle is too familiar to require extended illustration.

Supposing the object to be a legitimate one, to prevent and punish a possession of intoxicating liquors, which leads to temptation and facilitates the actual commission of the offence of unlawfully selling, by declaring that possession unlawful, if held with an intent and purpose of selling unlawfully, we have said, that this system of measures seems designed to accomplish this one purpose, by two distinct modes or courses of proceeding, both well known to the law, but of considerable difference in their modes of operation; the one, a proceeding *in rem*, by the sequestration and forfeiture of the property, or thing which is noxious, in itself, or made the instrument or subject of a noxious and injurious use; — the other a proceeding *in personam*, for the punishment of the person of the offender, as an example to deter others from the commission of

the like offence. Both are proceedings designed for the enforcement of the criminal law, and must be governed by the rules applicable to its administration.

We have no doubt that it is competent for the Legislature to declare the possession of certain articles of property either absolutely, or when held in particular places, and under particular circumstances, to be unlawful, because they would be injurious, dangerous or noxious, and by due process of law, by proceedings *in rem*, to provide, both for the abatement of the nuisance, and the punishment of the offender, by the seizure and confiscation of the property and by the removal, sale, or destruction of the noxious articles. Putrefying merchandise may be stored in a warehouse, where if it remained it would spread contagious disease and death through a community. Gunpowder, an article quite harmless in a magazine, may be kept in a warehouse always exposed to fire, especially in the night; however secreted, a fire in the building would be sure to find it, and the lives and limbs, of courageous and public spirited firemen and citizens, engaged in subduing the flames, would be endangered, by a sudden and terrible explosion. It is of the highest importance, that such persons should receive the amplest encouragement to do their duty, by giving them the strongest assurance, that the law can give them, that they shall not be exposed to such danger. This can be done only by a rigorous law against so keeping gunpowder, to be rigorously enforced by seizure, removal, and forfeiture. The case of goods smuggled, in violation of the revenue laws, and the confiscation of vessels, boats, and other vehicles, subservient to such unlawful acts, are instances of the application of law to proceedings *in rem.*

The theory of this branch of the law seems to be this: That the property of which noxious and injurious use is made, shall be seized and confiscated, because either it is so unlawfully used by the owner, or person having the power of disposal, or by some person, with whom he has placed and intrusted it, or at least, that he has used his power and control over it so carelessly and negligently, that by his default, it has fallen into the hands of those who have made, and intend to make the noxious and injurious use of it, of which the public have a right to complain, and from which they have a right to be relieved.

Therefore, as well to abate the nuisance as to punish the offending or careless owner, the property may be justly declared forfeited, and either sold for the public benefit, or destroyed, as the circumstances of the case may require, and the wisdom of the Legislature direct. Besides, the actual seizure of the property, intended to be offensively used, may be effected, when it would not be practicable to detect and punish the offender personally.

Supposing, then, that it is competent for the Legislature, as one of the means of carrying into effect a law to prohibit the unlawful sale of intoxicating liquors, to declare the keeping of such liquor for the purpose of sale, in any place, within any city or town of this Commonwealth, unlawful, and to declare the liquor thus kept, liable to seizure and forfeiture as *quasi* a nuisance, under a proper and well guarded system of regulations, the question is, whether the measures directed and authorized by the statute in question are so far inconsistent with the principles of justice, and the established maxims of jurisprudence intended for the security of public and private rights, and so repugnant to the provisions of the Declaration of Rights and Constitution of this Commonwealth, that it was not within the power of the Legislature to give them the force of law, and that they must therefore be held unconstitutional and void; and the court are all of opinion that they are.

The court are not insensible to the great weight of responsibility devolving on them, when they are called to perform the delicate, but important duty of deliberating on the validity and constitutionality of an act of the Legislature; and they would approach it with all the solicitude which its importance demands.

I. The measures directed by the fourteenth section of this act are in violation of the 14th article of the Declaration of Rights. That article declares that "every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the foundation of them be not previously supported by oath or affirmation," &c. The subject of general warrants, and of illegal searches and seizures under them, had been much discussed in England before the adoption of our Constitution, and was probably well understood by its framers. *Entick* v. *Carrington*, 2 Wils. 275. This case is much more fully reported, and the judgment of Lord

Camden given at length, in 19 Howell's State Trials, 1029. The measures authorized and directed by this act, are in violation of the principle and spirit of the article respecting general warrants and unreasonable searches.

1. Because the act does not require the three persons, who are to make complaint, to state that they have reason to believe, and do believe, that intoxicating liquors are kept or deposited and intended for sale by any person named; nor does it require the magistrate to state in his warrant to the searching officer the name of any person believed to be the owner or keeper of such liquors, nor the name of any person having the custody or possession thereof, nor the name of any person having the intention to sell the same. On the contrary, the complaint affects the place only, and the belief of the complainants that liquors are kept in such place, and are intended for sale. In this respect the warrant is general, not affecting any person, even by way of belief or suspicion, of the unlawful act of keeping such liquor for sale.

2. It does not limit the officer's authority and right of seizure, to the articles described, by quantity, quality, or marks; nor does it even restrict the officer's power of seizure to liquors kept and intended to be sold; although it is the avowed purpose of the act to make the keeping of such liquors unlawful, and subject them to forfeiture. But even were it to provide that the search and seizure should be confined to liquors intended for sale, it would be open to another objection, perhaps quite as formidable, which is, that it would be left to the mere discretion of an executive officer to judge and decide what were so intended for sale and what were not, leaving it to him to decide what to take and what to leave, and making his decision conclusive. We say conclusive, for if the seizing officer does not take them, the magistrate acquires no jurisdiction over them, and no other tribunal or magistrate can entertain the question whether they were intended for sale, and so liable to forfeiture or not. No liquors, therefore, could be adjudged forfeited under this section, unless the searching officer should take and return them, as, in his belief, intended for sale.

3. Again, if the three persons state their belief that any spirituous liquors are kept or deposited and intended for sale, in any store, shop, or warehouse, or in any steamboat or other vessel, or in any vehicle, or in any building or

place, then the warrant shall issue, and the sheriff or constable shall proceed to search the premises — that is, the store, vessel, or place described, and if any spirituous liquors are found therein, he shall seize the same. Under this express power and direction, if a few kegs, demijohns, or bottles of liquor, are placed in a warehouse, or on board a ship, or steamboat, by some person intending to sell them, or under such circumstances, that three respectable persons can safely testify that they believe that they are so intended for sale, then the officer shall seize and remove the whole stock of the warehouse, or the whole cargo of the ship or steamboat, so far as it may consist of wine, spirits, or intoxicating liquors. This makes it the imperative and indispensable duty of the officer to seize all the liquors found, however clearly it may appear to him, that the larger quantity is about to be sent to other States or to a foreign country, and not intended for sale in the city or town, where the liquors are found, or even in the Commonwealth. This would be equally the officer's duty, whether the liquors should be found in kegs, or in larger packages, as pipes or hogsheads. Thus the authority to seize is carried greatly beyond the articles, the possession of which is made unlawful, and the keeping of which is intended to be treated by the act as a nuisance, to wit, spirits kept and intended for sale.

It appears to us, therefore, that this act in terms warrants and requires unreasonable searches and seizures, and is therefore contrary to the Constitution.

If it be said, that the act provides for as much certainty in the description of the articles to be searched for and seized, and in the definition and limitation of the officer's power, as the nature of the case will admit — that the complainants cannot know with certainty, before search made, that spirits are deposited in the place described, or are intended for sale, and can only state their belief; and that neither the complainants nor the magistrate can know, before search, who is the owner, or has the custody, or intends to sell, and therefore cannot name him; and that it is impossible for the complainants or for the searching officer to distinguish what part of the liquors found are intended for sale, and that that must be a subject of inquiry before the magistrate afterwards, the answer seems to us to be obvious, that if these modes of accomplishing a laudable purpose and of carrying into effect a good and

wholesome law, cannot be pursued without a violation of the Constitution, they cannot be pursued at all, and other means must be devised, not open to such objection.

Another ground is, that if, upon a complaint that some liquors are kept in a warehouse, or on board a vessel, believed to be intended for sale, a warrant shall go, and the officer is obliged to seize all the liquors found in the same store or vessel, and such is the plain direction of the statute, then the officer must seize such liquors, though imported and remaining in the original packages, a cargo of wine and brandy, for instance, and bring them before the magistrate. This would be an interference with the regulation of foreign commerce placed under the exclusive jurisdiction of the Constitution and laws of the United States. And though there is a provision in this act, that the owner of such imported liquors may go before the magistrate and obtain their release by proof of the facts, yet such seizure and detention, perhaps for a long period, would be in danger of bringing this power into conflict with the laws of the United States, which, within their proper sphere, are the supreme law of the land.

II. Another ground upon which we are of opinion that this section of the act is unconstitutional is, that in the commencement and course of proceedings, required and directed by the series of measures provided for in the act, many of the precautions and safeguards for the security of persons and property, and the most valuable rights of the subject, so sedulously required and insisted on in the laws of all well ordered governments, and specially prescribed as the governing rule of the Legislature in our Declaration of Rights, are overlooked and disregarded.

The Declaration of Rights declares, Art. I., "All men have certain natural, essential and inalienable rights, among others, that of acquiring, possessing, and protecting property." Art. X. "Each individual has a right to be protected in the enjoyment of his property according to standing laws." Art. XI. Every subject ought to find a certain remedy, by having recourse to the laws, &c., to obtain right and justice freely, &c.

Art. XII. No subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him. He shall have a right to produce all proofs favorable to him, to meet the witnesses against him face to face, to be fully heard in his

defence; and no subject shall be arrested or deprived of his property, liberty, or estate, but by the judgment of his peers or the law of the land.

These are homely and familiar maxims, scarcely requiring citation, and yet the Declaration of Rights itself — Art. XVIII. — admonishes us that a frequent recurrence to them is absolutely necessary, to preserve the advantages of liberty and maintain a free government, and that the people have a right to require of their law-givers and magistrates an exact and constant observance of them.

In comparing the section in question with these injunctions of the Declaration of Rights, the first thing to be remarked is, that it vests extraordinary and unusual powers in justices of the peace, not merely to take preliminary measures, such as receiving and verifying complaints, issuing warrants of search and arrest, and the like; but it also invests them with jurisdiction to adjudicate upon an unlimited amount of property.

There can be no doubt that spirituous liquors, at least before they are judicially and finally confiscated, and ordered to be destroyed, are property; this act so recognises them.

1. Then recurring to the course of proceeding under this statute, the first step required is the complaint of three persons, *ex parte*, and no provision is made that in any stage of the proceeding these complainants are to be again examined, nor that the party whose property is taken shall have opportunity to meet them face to face; yet, as we shall see, their oath to their belief of a certain fact is the only evidence upon which the property may be adjudged and forfeited.

There is no provision or direction that the name of any person may be inserted in the complaint, or in the warrant; and if the complainants or the magistrate do name a person, in the warrant, as an owner, or one having possession, it is no direction or authority to the officer to summon such person, either to defend the property, or answer to any complaint. The direction in the statute is, that the sheriff or constable shall search the premises described in the warrant, and if any spirituous liquors are found therein, he shall seize the same, &c., and the owner or keeper of said liquors, seized as aforesaid, if he shall be known to the officer seizing the same, shall be forthwith summoned before the justice, and if he fail to appear, or unless he can

prove that they are lawfully kept, they shall be declared forfeited, and shall be destroyed. It depends on the contingency of the owner or keeper being known to the officer, be he named in the warrant as such or not, whether any body is summoned or has notice. If the officer returns the name of some person, as owner or keeper, and such person does not forthwith appear, then the liquor may be adjudged forfeited, without further notice or proof. The officer, who, of course, must act upon hearsay, and the best information he can obtain, however honestly he may endeavor to ascertain the truth, may be mistaken in his return of the name of a person as owner or keeper, and then the property may be confiscated and destroyed without any opportunity given the true owner to appear and defend.

2. But suppose the officer happens to be right, and the owner has notice, the notice is to appear forthwith. No day in court is given, no allowance made for the contingency of the owner's absence, or sickness, or engagements. No provision is made that personal notice shall be given, or that proceedings shall be postponed until personal notice be given. A summons at the owner's last and usual place of abode, would be good service, where not otherwise specially directed. Upon such constructive notice, which may not reach the owner personally, and which, from its shortness, is very likely not to reach him until after the confiscation and destruction of the property, if he fail to appear forthwith, the property may be declared forfeited, and the party whose name is thus returned as owner or keeper, may have judgment against him personally for a penalty and costs.

These measures seem wholly inconsistent with the right of defending one's property, and of finding a safe remedy in the laws.

3. But if the owner or keeper shall be unknown to the officer seizing the liquors, they shall not be condemned and destroyed until they shall have been advertised, with the number, &c., for two weeks, by posting up a written description, in some public place, that if such liquors are actually the property of any city, or town, purchased for sale by the agent, for medicinal, mechanical or chemical purposes only, or of some person duly authorized, or are otherwise lawfully kept, they may not be destroyed; but upon satisfactory proof of such ownership

within said two weeks before the justice, he shall deliver to the agent, &c., an order to the officer to deliver them up.

Whether such a written advertisement posted in one place, is adequate public notice, it is for the Legislature to decide. The manifest objection to this notice is, that it fixes no time or place, at which a claimant may appear with his evidence, and have a trial, and meet the witnesses face to face. It pre-supposes that he is to appear and offer his proofs at any time when the magistrate may be found, and is ready and willing to hear him, and receive and consider his proofs. It looks to no trial, but assumes that the liquors are to be condemned, unless a claimant can make such proof.

The theory, upon which a judgment *in rem* is regarded as a judgment binding upon all the world, is, that all the world have constructive notice of the seizure, with the cause and purpose of the taking, and the time and place at which any person may appear before a competent tribunal and have a trial before the condemnation of his property.

Supposing the process *in rem*, when rightly conducted, is a suitable and proper mode of enforcing obedience to a useful and salutary law, it does it by punishing the offender, who must be the owner, or some person intrusted with the possession by him, or some person, for whose unlawful possession of it the owner is responsible; it does this by depriving such owner of his property, and at the same time preventing the further noxious and unlawful use of it. Such being the character of the prosecution, in a high degree penal in its operation and consequences, it should be surrounded with all the safeguards necessary to the security of the innocent, having the full benefit of the maxim, that every person shall be presumed innocent until his guilt be established by proof. He should have notice of the charge of guilty purpose, upon which his property is declared to be unlawfully held, and in danger of being forfeited, and allowed a time and opportunity to prepare his defence, an opportunity to meet the witnesses against him face to face, and the benefit of the legal presumption of innocence.

4. But there is another objection to the constitutionality of this law, of a more formidable character, and as it appears to us quite decisive of the case. Supposing the owner of the liquor to have had full notice, to have

appeared before the magistrate, and to have had full opportunity to procure evidence and prepare for trial, no provision is made by the statute for a trial, for a determination by judicial proofs of the facts, upon the truth of which alone the property can be justly confiscated and destroyed. On the contrary, the statute expressly directs, that if the owner fail to appear, or (that is if he does appear) unless he shall prove that the liquors were lawfully kept, they shall be declared forfeited and the owner shall be adjudged to pay a fine and costs. There is no room for implication; the judgment shall pass for the forfeiture and fine unless the owner can prove that they were lawfully kept. This is the most favorable provision made for him. The judgment, then, passes without trial and without proof, unless that which preceded the seizure, and the seizure itself, are to be considered as legal proof.

To see whether any trial is provided for, we must first ask what is to be tried. The case supposes that the keeping of spirituous liquors intended for sale is made unlawful by the statute itself, that the illegality consists in the intent of selling, that the intent qualifies the act of keeping, and impresses on the property illegally kept the character of a nuisance, which makes it lawful to seize the property thus made the instrument of an illegal purpose, and confiscate and destroy it. This is done, as well to remove and abate the nuisance, and prevent the illegal use of it, as to punish the owner, upon whom ultimately the loss must fall, by a deprivation of property, in the nature of a penalty. What then is the fact upon which any adjudication must proceed? Clearly keeping with an intent to sell. As keeping without such intent would not be illegal, the whole criminality of the act, as well that which affects the owner or keeper personally, as that which stamps the character of illegality upon the property, is the intent to sell it. This intent must be that of the owner or of his agent, servant or bailee, having acquired through him the possession and the actual power to sell it. The intent of a mere stranger, having no possession or control over it, could not bring it within the act, and render the possession unlawful. The fact then to be proved, the main, the indispensable fact, in order to render the keeping illegal, and without which there is no legal ground for a penal judgment, is, the intent of the owner, or other person in possession of the property, to sell it in violation

of the law. Now we can perceive no provision for the trial and proof of this offence of keeping liquors with illegal intent, in any sense in which a judicial trial is understood, in which a party charged with an offence, for which his property may be taken from him and confiscated, may stand on his defence, and have the presumption of innocence, until proofs are adduced against him to establish the crime or misdemeanor with which he is charged. Such a trial alone can satisfy the express provision in the Declaration of Rights (Art. 12,) which declares that no subject shall be arrested, or deprived of his property, &c., or of his life, liberty or estate, but by the judgment of his peers, or the law of the land. These expressions have been understood, from *Magna Charta* to the present time, to mean a trial by jury, in a regular course of legal and judicial proceedings.

In order to ascertain whether provision is made for such a trial, we must look to the statute, and see upon what grounds a judgment of forfeiture shall be had. The warrant is issued, the goods, including all liquors found at the place designated, are seized and detained by the officer, subject to the order of the justice, and the owner or keeper is summoned; what is then to be done? The statute answers: If he fail to appear, or unless he can prove that said liquors are of foreign production, imported, &c., contained in the original packages, &c., and in quantities, not less than the laws of the United States prescribe; or are kept for sale by authority derived under this act, (*i. e.* by an agent of the city or town;) or are otherwise lawfully kept, they shall be declared forfeited. The most favorable privilege offered to the owner is, that he may prove, if he can, that the liquor was lawfully kept. If he offers no proof, or fails to satisfy the magistrate, then it is to be declared forfeited. But, upon what proof? The act seems to presuppose that a *primâ facie* case of unlawful keeping has been established, upon which, unless rebutted, a judgment may pass. But again, we ask upon what preceding evidence has any *primâ facie* case been proved? The oath of the original complainants could be no proof for many reasons: It was *ex parte* and made for another purpose, to wit, to obtain a warrant; it states their belief, that some liquors were kept in the store, vessel or place described, upon which all the liquors there found, as well those to which the oath may have been intended to apply as all

others, are seized, brought under the control of the magistrate, and now stand before him, for their deliverance, which must depend upon his adjudication. But such a complaint if it could be held to apply to all the goods seized, could on no principle be regarded as evidence on a trial. If the complainants, respectable as they are required to be, were to be regarded as witnesses, their preliminary examination is *ex parte;* they are not required to appear before the magistrate afterwards, and after some person has been summoned, and the accused has no opportunity to meet them face to face. An indictment is far more precise and explicit, charging all the particulars of an offence with technical accuracy, and is found on the oath of at least twelve men upon evidence given on oath. As well, therefore, might a statute provide, that upon an indictment being read, the party charged should be convicted, unless he can prove that he is not guilty. Yet, up to the time of the appearance of the respondent before the magistrate, such preliminary complaint is the only semblance of evidence, of any criminal intent, to render the owner or keeper liable either to the forfeiture of the property, or to a judgment for a penalty. The fact that the liquor was found in the custody of the respondent when seized, is no evidence of unlawful intent to sell. The place, time and circumstances, and the mode in which it is kept, if proved by witnesses, might be evidence of such intent. But no such testimony is required, and what we mean to say, is, that the finding of the liquor, the fact of seizure, and the custody by the officer, afford no evidence as to that intent, which makes the property liable to forfeiture, and subjects the keeper to a penalty.

These considerations apply to the property of those intended by the complainants to be charged as the guilty owners or keepers, but who, before judgment of forfeiture, are entitled to a fair trial. But they apply with greatly increased force, to those not even believed by the complainants to be guilty owners or keepers, but whose liquors in the same warehouse or vessel, are swept by the statute, and the proceedings under it, into the same net, and are in danger of the same condemnation, by a judgment, without the trial assured by the Declaration of Rights. We have only to look at the plain directions of the act, to perceive that it provides for no trial, in any proper or judicial sense: that it permits and requires a judgment of forfeiture,

if no proof, or if proof not satisfactory to the magistrate, is offered by the respondent. In this respect, this enactment is in violation of the plain dictates of justice, and contrary to the letter and spirit of the Declaration of Rights. This statute declares that a subject may be deprived of his property, under the forms of law, without meeting the witnesses face to face without being fully heard in his defence, in an unusual mode, not by the judgment of his peers, or the law of the land.

Probably it was not the intention of the Legislature to direct a proceeding subversive of the rights of the subject; and it is quite probable that magistrates and courts, acting in conformity with the more familiar and established maxims governing the administration of justice, have required proofs on the part of the prosecutor, and given to respondents some of the privileges of a defendant, before proceeding to a judgment. But in order to judge of the conformity of the enactment to the requisites of the Constitution, we must be governed by the terms and provisions of the act itself, and cannot construe it according to any presumed intention of the Legislature not expressed; especially against an expressed intention.

In a law directing a series of measures, which in their operation are in danger of encroaching upon private rights, vesting in subordinate officers large powers, which, when most carefully guarded, are liable to be mistaken or abused, and which are to direct, limit and regulate the judicial conduct of a large class of magistrates, it is highly important that the powers conferred, and the practical directions given, be so clear and well defined, that they may serve as a safe guide to all such officers and magistrates, in their respective duties; and in these respects, the statute itself must, on its face, be conformable to the Constitution.

We have already alluded to section sixteen as one of this series of measures, which provides that "if any owner or keeper of liquors, seized as aforesaid, shall appeal," &c. upon which it is proper to make one or two remarks. It is obvious that this section does not give an appeal in terms, but only hypothetically; nor does it state from what judgment, but we presume it to be from the entire judgment, for forfeiture and fine. It is further to be noticed, that the appellate court is not authorized in terms to render a judgment against the appellant for a fine. But it is important to cite all that part of the section which directs what final

judgment the appellate court are to give. It is as follows: "If the final decision shall be against the appellant, that such liquors were intended by him for sale, contrary to the provisions of this act, then such liquors shall be destroyed as provided in section fourteen." If this clause had stood alone, it might have been plausibly, perhaps strongly argued, that, by such "final decision," that such liquors were intended by the appellant for sale, must be understood a judicial decision to be arrived at in a regular course of trial, upon allegations and proof; thus by implication intending a trial, according to the maxims and forms of law. It is hardly to be presumed that the Legislature intended to direct a different mode of trial and form of judgment in the appellate court, contrary to the common theory of an appeal, which is to enable a higher court, in a case depending upon the same state of facts and the same rule of law, to re-examine the judgment of a lower court, and affirm or reverse the judgment; though perhaps it would be in the power of the Legislature to do so, by words sufficiently expressed to manifest such intention. But if such were the intention, it would leave the objections already made in full force.

If it should be urged, that upon the maxim of construction, that every part of a statute may be resorted to, for expounding every other part, this clause manifests the intention of the Legislature that a regular trial shall be had in the proceedings before the magistrate, the answer is, that the *directions* in regard to the proceedings there and to those preliminary thereto, as well when there is no appearance and no power of appeal, as when there is, are too plain, explicit, and mandatory to admit of any such construction. Besides, the rights of parties ought not to be made to depend on a doubtful interpretation of various, and, in some respects, incompatible and conflicting provisions.

It may be proper slightly to notice an objection to the constitutionality of this law, in so far as it directs the taking of private property for public use, without making any compensation therefor, contrary to Art. 12 of the Declaration of Rights. We are of opinion, that this clause has no bearing on and no connection with this subject. It is a most wise and salutary principle, but relates to another class of subjects and of rights. If spirituous liquor is rightfully taken at all, it is on the ground that it is illegally kept: that being so kept, it is noxious to the public and *de facto*

a nuisance, and when it is adjudged forfeited, it is because it is so noxious and declared to be such by law, the owner's right of property is divested by the judgment, and he can have no claim to compensation.

III. Thus far we have considered this section as it directs proceedings *in rem*, to effect the forfeiture and destruction of liquors. But it also authorizes a judgment for a fine and costs, with an alternative sentence to imprisonment thirty days, in case of non-payment; and it is contended that, as a proceeding *in personam*, it is equally repugnant to the Constitution.

If this branch of the act treats the case as a proceeding in the administration of criminal justice, to recover a penalty, for a violation of the statute law of the Commonwealth, it is to be commenced, prosecuted and conducted, in the manner required by the Constitution. Art. 12 of the Declaration of Rights directs, in addition to the other provisions common to both modes of prosecution, that no subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally described to him. Art. 14. All warrants therefore are contrary to this right, (to be secure from searches and seizures,) if the cause or foundation of them be not previously supported by oath or affirmation.

1. The offence intended to be declared and punished, by this section, is keeping or depositing spirituous liquor, in any shop or vessel, &c., intended for sale. The statute, after the provisions for a seizure, forfeiture and destruction of the liquor, proceeds to add, that the owner or keeper of said liquor (the liquor confiscated and ordered to be destroyed) shall pay a fine of twenty dollars and costs, or stand committed for thirty days, in default of payment, if in the opinion of said court, said liquor shall have been kept or deposited for sale, contrary to the provisions of this act.

The statute does not distinctly and in terms make the keeping of liquors intended for sale a distinct, substantive offence, punishable by fine, but only circuitously and by implication, through the medium of a search, seizure and forfeiture. The statute does not require the complainants to state, either as fact or belief, that the defendant, or any person designated, has kept or is keeping liquor for sale contrary to law; on the contrary, it seems studiously to avoid naming any body, by requiring the complainants to state their belief, that liquors are kept and intended for sale in

the place designated, seeming to look to the result of the search to be made on the warrant, which is to issue on the complaint, to ascertain whether liquors are so kept and by whom. When they are seized by the officer, the owner or keeper is to be summoned by him, not in pursuance of any direction in the warrant, but upon his own knowledge. Summoned for what? Not apparently to answer to any complaint against him personally, but to enable him to look after his property thus seized, and defend it if he can. The only cognizance which the magistrate can take, the only jurisdiction he has over the person of any one as owner or keeper, is that derived from the return of the officer on his search-warrant; he certifies that he has seized certain liquors described, and summoned a person named as one whom he knows to be the owner or keeper of the liquors seized. The jurisdiction of the person, such as it is, is incidental to the jurisdiction over the property, obtained by the seizure.

2. But could we regard this as a statute making the keeping of liquor, intended for sale, a distinct substantive offence, punishable by fine, and giving jurisdiction of it to a justice of the peace, as an ordinary case, *in personam*, still we think it fails to conform to the Constitution, in the articles above cited. There is no complaint setting forth the offence, either fully, substantially or formally. The complaint required to be made by three voters, has accomplished its office, when it has laid the foundation for the search-warrant. The complaint, if it follows the statute, names no one as a party chargeable with the offence of unlawfully keeping; there is no warrant or process to arrest or summon such person: on the contrary, the officer is directed to summon the owner or keeper if known to him. Suppose the complainant, though not required by the statute, should name some person as owner or keeper, and the officer, upon search, should summon another person as one known to him to be the owner or keeper, — which is the person charged? Which is amenable to the law, and liable to judgment of fine and imprisonment? And against which of them can the magistrates render a judgment *in personam?*

The specific ground on which this part of the statute, directing proceedings *in personam*, is repugnant to the provisions of the Constitution, is, that considered as a charge of crime or offence, there is no provision for an indictment,

information or complaint, on oath or otherwise, in which the specific offence of keeping or depositing spirituous liquors, intended for sale, is in any way described, so that it can be put on record and traversed, or an issue thereon be joined and tried in due course of law.

The return of the officer, which alone can bring the name of an owner or keeper before the magistrate, cannot satisfy the requisites of the Constitution: it is not a direct charge against him of keeping liquor, intended for sale; he is not summoned to answer such a charge, but to inform him of the seizure; and the charge is not on oath. The judgment to be rendered for fine and costs, is not a distinct independent judgment on a charge of a personal offence, but is only incidental to a judgment of forfeiture and confiscation of property. The provision in regard to the judgment *in personam*, is, after directing that the liquor shall be declared forfeited and destroyed, that the owner or keeper of said liquor (liquor ordered to be destroyed) shall pay a fine of twenty dollars, &c., if in the opinion of said court said liquors shall have been kept or deposited for sale contrary to the provisions of this act.

Now supposing this should be construed to mean a judicial opinion, formed upon examination and proof, it would be obnoxious to the objections of being repugnant to the Constitution; — first, because it would be a conviction, for a penalty, without any substantial and formal charge described and set forth, with opportunity to defend, contrary to the Declaration of Rights; and secondly, because the matter of fact of which an opinion is to be formed in order to convict, is not, that the respondent whose name has been returned as owner or keeper has kept the liquor with intent to sell, but only that the liquors were kept for sale, which might be true if kept by any other person. A party therefore may be convicted, and sentenced to fine and costs, and imprisonment, for an offence neither legally charged nor legally proved to have been committed by him.

In the case of *Fisher* v. *McGirr*, several particular exceptions were taken to the regularity of the proceedings, which would require more particular consideration, had we not already come to the conclusion that the section under which the seizure was made and is now sought to be justified, was unconstitutional and void. Still there is one question, to which it is proper to advert. This is in the nature of an action of trespass *vi et armis*, and the question

is, whether it will lie against an officer who merely acts under the direction of a warrant from a magistrate, and does not go beyond the line of his duty as marked out by his warrant. This is certainly an important consideration, inasmuch as it is for the interest of the community that subordinate and executive officers should, as far as possible, be protected in the full and fearless discharge of their duties, leaving all responsibility for errors in judgment and irregularities of process to rest upon others. But this principle must have some limit. It would be dangerous and injurious to the common rights of citizens, if one man, under the mere color or semblance of legal process, could justify the arrest and imprisonment of the person, or the seizure and removal of property of another, without any responsibility. And we take the well settled line of distinction to be this — If the magistrate or tribunal from which the process issues has jurisdiction, and the process is apparently regular, the officer may safely follow and obey it, and justify himself under it. But if the magistrate has no jurisdiction, the process is not merely voidable, but wholly void — the officer taking property under it has no authority, and is therefore liable to an action of trespass.

The case already cited of *Entick* v. *Carrington*, 2 Wilson, 275, and S. C. 19 Howell's State Trials, 1029, was an action of trespass against messengers, under a warrant from a Secretary of State. It being held that the warrant was void, because not within the jurisdiction of the magistrate, the action was sustained, and considerable damages recovered.

Where one is committed under process wholly void, trespass will lie. *Groom* v. *Forrester*, 5 M. & S. 314. So, for goods levied upon by order of a magistrate, who had no jurisdiction. 7 B. & Cr. 536. So, in the Supreme Court U. S. the principle is stated by Marshall, Chief Justice — It is a principle, that a decision of such a tribunal, (a court martial,) in a case clearly without its jurisdiction, cannot protect the officer who executes it. *Wise* v. *Withers*, 3 Cranch, 337. So in New York. When it appears on the face of the process, that the court or magistrate had no jurisdiction, it is *void*, and affords no protection to the officer who has acted under it. *Savacool* v. *Boughton*, 5 Wend. 172. But if the court has jurisdiction, and the process is right on its face, though wrongly issued, the officer is justified. *Lewis* v. *Palmer*, 6 Wend. 369. The principle is recognised in many cases in this Commonwealth, and is stated

by Metcalf, J., by way of illustration in a very recent case. In case of imprisonment, a jailer is not answerable, unless he acts under the mandate of an inferior court, which has not jurisdiction of the cause, or by virtue of a warrant which on its face shows the magistrate's want of jurisdiction. *Folger* v. *Hinckley*, 5 Cush. 263.

The law relied on for a justification being void, gave the magistrate no jurisdiction and no authority to issue the search-warrant; the officer cannot justify the seizure under it, and therefore an action lies against him for the taking.

Judgment for the plaintiff, for $——, according to the agreement of the parties.

COMMONWEALTH *v.* MOSES ALBRO.

Constitutional Law — Pleading.

Where a statute is unconstitutional, and therefore void, all proceedings under the statute are void.

A void statute cannot be made operative by averments in the pleadings.

THIS case comes before this court by exceptions from the Court of Common Pleas. The case originated in a complaint made by three selectmen, of Fall River, being legal voters, to the Police Court, in August, 1852, founded on the Stat. 1852, c. 322, concerning the manufacture and sale of spirituous and intoxicating liquors. The complaint was against Albro and Anthony, both of whom were convicted before the Police Court. On appeal to the Court of Common Pleas, Anthony was acquitted, and a judgment was rendered against Albro, by which the liquors were adjudged forfeited, and ordered to be destroyed, and the said Albro adjudged to pay a fine of twenty dollars and costs. This in form appears to be one entire judgment. Exceptions having been taken by the defendant, and allowed by the court, the whole case now comes here for revision. Having come to the decision, that the statute, which was the sole foundation and authority for these proceedings, in that part of it which provides for a search, seizure, and forfeiture of spirituous liquors, is unconstitutional and void, it follows that the exceptions must be sustained, and further proceedings in the case stayed.

It may be proper to remark upon these proceedings, that the complaint and warrant were so framed, and the proceedings so conducted, as, if practicable, to avoid many of

the objections to the constitutionality of the statute. The complaint sets forth that the complainants believe that liquors are kept and deposited in a warehouse (which was described), "occupied by one Moses Albro and William A. Anthony, and intended for sale, by them, the said Moses and William, in said Fall River, not being authorized," &c. Here it is not a direct charge that they kept, &c., which is the offence supposed to be created by the statute. So the warrant, after reciting the complaint and the prayer for process, commands the officer, not only to search, and, if found, to seize and keep the liquors, but also to summon said Moses and William to appear before the Police Court, and there show cause, if any they have, why said liquors should not be declared forfeited, to be destroyed, and they be adjudged and held to pay a fine of twenty dollars and costs.

It does not distinctly appear how and upon what evidence the conviction was, in fact, had, either before the Police Court or the Court of Common Pleas; but as it appears, upon the bill of exceptions, that the government offered no other evidence to prove that Albro was not licensed, the implication is, that upon other points of the case, they did offer evidence, and very probably offered evidence to prove that the defendants, or one of them, did own and keep the liquors, and did intend to sell them in Fall River.

But these considerations do not remove the objections to the constitutionality of the statute. The defect of the statute is, that it it does prescribe these measures, without the precautions required by the Constitution for the safe execution of the law.

Therefore, if particular magistrates and courts, perhaps feeling the force of these objections and adopting expedients to avoid them and diminish their force, take precautions for that purpose not required, perhaps, not permitted by the actual terms of the statute, this cannot justify a judgment under so defective a law. The statute is to be carried into operation by hundreds of magistrates and officers, and if it fail in those qualities and characteristics required by the Constitution to give it the force of law, and afford the full protection of the law to all those who act under and obey it, it is so far void, and cannot be made good in any particular case by attempts to supply its defects.

In re Josiah Herrick, *Petitioner for Habeas Corpus.*

Habeas Corpus — Practice — Liquor Law.

When proceedings are irregular or erroneous, if the court has jurisdiction, the judgment is voidable only, and not void; and the remedy to reverse it is by writ of error or *certiorari*.

But where it appears upon the face of the proceedings that the magistrate had no jurisdiction, the proceedings are wholly void, the commitment is without authority, and the party committed is entitled to be discharged without the reversal of the judgment; and in such case the proceedings by *habeas corpus* are the proper remedy.

Whether in any case a person charged with a criminal offence can be convicted and sentenced, in his absence, to the judgment of a fine and costs, and process issued in the nature of an execution to collect it, *Quære*.

But if the Legislature can provide by law, that on a charge of a crime or misdemeanor, the process may be by summons instead of arrest, it is necessary that the summons contain a full and direct statement of the offence charged, and specify a time when, a place where, and the tribunal before which, he is to appear and answer.

Josiah Herrick applied to this court by petition for a writ of *habeas corpus* to the keeper of the jail in Salem, in the county of Essex, to bring up the body of said Herrick. By the return of Gorham Smith, jailer, it appears that Herrick stands committed on a warrant or mittimus, issued by David Choate, Esq., a justice of the peace, reciting a complaint and warrant under the liquor law, a seizure and return of certain intoxicating liquors, a judgment of forfeiture of said liquors to be destroyed, and the sentence of said Herrick to the payment of a fine of $20 and costs, and because Herrick had not paid the same, directing him to be committed to prison and there kept thirty days, or until he should comply with said sentence, or be otherwise discharged by due course of law.

Notice having been given to the attorney-general, as required by the habeas corpus act, when a prisoner, on the return of a habeas corpus, appears to stand committed, on conviction of a criminal charge, the attorney-general has appeared, and the case has been argued on both sides.

A question was made by the attorney-general, whether the prisoner could be relieved on *habeas corpus*, even though the conviction is wrong, and whether his remedy is not by writ of error or *certiorari*, on the authority of *Riley's case*, 2 Pick. 172. We take the distinction to be this: When the proceedings are irregular or erroneous, if the court or magistrates have jurisdiction, the judgment is voidable only, and not void, and of course must stand good

until reversed or anulled in a proper course of proceeding, by a court having authority to revise and annul it. But where it appears, on the face of the proceedings, that the magistrate had no jurisdiction, the proceedings are wholly void, the commitment is without authority, and the party committed is entitled to be discharged from his imprisonment, without reversal of the judgment.

The case being rightly before us, the court are all of opinion, that, for the reasons already given, because that section of the law under which the conviction was had is unconstitutional, the judgment is void, and the prisoner is entitled to be discharged from custody.

From the mittimus alone, it might appear doubtful, whether the prisoner was personally present or not, when the conviction for the penalty was had; but recurring to the justice's minutes of the proceedings, it appears that he was not. No complaint was read to him, and no plea entered for him. Whether in any case a person charged with a criminal offence, can be convicted and sentenced in his absence to the payment of a fine and costs, and process issue, in the nature of an execution, to collect it, we give no opinion. Commonly, on a criminal charge, the party is brought before the magistrate by warrant and arrest, and then he is in a condition to be bailed or committed, and to know and take notice of all orders and proceedings in the case. But if it is competent for the Legislature to provide by law, that on a charge of a crime or misdemeanor the process may be by summons instead of arrest, it is necessary that the summons contain a full and direct statement of the offence charged, and specify a time when, a place where, and the tribunal before which, he is to appear and answer.

Again, the mittimus appears to us to be erroneous, and founded on a misconception of the law, in this: After reciting the conviction, it directs the jailer to arrest and keep the prisoner thirty days, or until he shall comply with the sentence, *i. e.*, as we understand, unless he shall sooner pay the fine and costs. This appears to us to be irregular. The alternative judgment, to pay or stand committed, is passed in the first instance, and the person convicted has his election, but if he does not pay, which the justice is to know and determine, then the alternative part of the udgment, to stand committed thirty days, becomes absoute. The imprisonment is to be the punishment, and is

not used as a means to enforce payment of a fine and costs, and the mittimus issues accordingly. No alternative remains, the officer or jailer has no authority to receive the money, and discharge the prisoner within the thirty days.

One other remark occurs to us on these proceedings, showing that the law is practically construed as we suppose it is, which is, that the proceeding for the fine and that for the forfeiture are connected together and dependent on each other. The costs, with which the defendant is charged, are not merely the costs of a proceeding *in personam*, as on a separate and independent process, but include all the expenses of the seizure, keeping, and destruction of the liquors, under the other branch of the judgment.

These considerations are not necessary to the decision of this case, which rests on the grounds, taken in the principal opinion; but they seem naturally to arise from the view there taken, and tend to explain it.

Ordered, that Josiah Herrick be discharged from his imprisonment.

Suffolk, November Term, 1853.

GEO. H. RICHARDS ET AL. *v.* LEVI B. MERRIAM.

Insolvent Debtor — Compromise by Assignee — Allowance to same.

The Supreme Court will not interfere under Stat. 1838, c. 163, § 18, to revise a compromise with the debtor of an insolvent made by his assignee under the direction of the commissioner.

A bill in equity cannot be maintained under section 18 by an insolvent debtor to reduce the allowance made to his assignee for his services as excessive, which does not allege that the debtor's estate paid at least fifty per cent. of his debts besides the charges of the insolvent proceedings, as he is not otherwise interested in the amount of the allowance.

THIS was a bill in equity under Stat. 1838, c. 163, § 18, to set aside a compromise by the plaintiff's assignee with certain debtors, and to reduce the allowance made to the assignee for his services as excessive. The facts in the case sufficiently appear in the opinion of the court, which was delivered by

MERRICK, J. — This bill in equity was brought and has been prosecuted by the complainants, George H. and Henry Richards, as well for the use and benefit of their several creditors as for themselves. And they claim that, upon the facts therein particularly charged and recited, they are entitled to maintain it under and by virtue of the provisions of the 18th section of the 163d chapter of the statutes of 1838. The respondent demurred to

the bill, and therefore the questions of law now to be determined arise upon the allegations contained in it.

From those allegations it appears, that theretofore, on a certain day named, the said complainants, George H. and Henry Richards, being indebted to various persons and unable to pay all their just debts, presented their petition to a commissioner of insolvency for the county of Suffolk, praying that by warrant under his hand and seal he would appoint some suitable person as messenger to take possession of all their estate, and that such other and further proceedings might be had upon and under their petition relative to them as insolvent debtors, as were required and provided for in the aforementioned statute; and that upon proper and legal proceedings afterwards in fact had thereon, the respondent, Merriam, was duly chosen and appointed assignee of their estate, and assumed and undertook to perform and discharge all the duties which thereby devolved upon him.

The bill then alleges the precise causes of complaint, and for which relief is prayed. First, that the respondent while in the exercise of his office, power and trust as such assignee, made and effected, under the direction and with the approbation of the commissioner of insolvency, a compromise and settlement with Phillips & Mosely of a certain claim and demand which in behalf of said estate he had and held against them, and that that compromise and settlement was inexpedient, injudicious, and injurious to the complainants, to their several creditors, and to all parties interested in said estate; and, secondly, that the respondent has been allowed by the commissioner in insolvency to retain for his own compensation out of the moneys which came into his hand as assignee, an unreasonably large sum, not warranted by law or legal usage, and much beyond what he ought to receive both for services rendered and responsibilities incurred. And the prayer of the complainants therein is, that the said compromise and settlement may be set aside, and that the said allowance to the assignee may be reformed, reduced, and corrected.

None of the creditors of the complainants have at any time united with them in the prosecution of the bill, or signified their assent to it; and respondents object that the relation of those parties to each other is such as not to entitle the latter to institute or maintain any such process as this in behalf of or for the benefit of the latter. Their rights and interest are indeed not identical or even similar, but are adverse and conflicting. The complainants do not attempt to answer or obviate the objection thus taken, but by consent of the respondent they amend their bill by cancelling and withdrawing from it all the allegations it contains, for, on account, or in behalf of their creditors, and thereupon proceed with it for their own relief.

The first and principal question raised by the demurrer on the bill as thus amended, is, whether this court will entertain, and take jurisdiction of it, for the purpose of amending or revising the compromise and settlement with Phillips & Mosely, made by the assignee and approved of by the commissioner of insolvency. The 11th section of the statute gives to the assignee "power, under direction of the judge or commissioner of insolvency, to compound and settle, by agreement with the other party thereto, any controversy which may arise in the settlement of any demands against the estate of the debtor, or of debts due to his estate, as he shall think proper, and most for the interest of the creditors." The full and ample authority thus conferred on the assignee is subjected to no other limitation or restraint than the controlling direction of the magistrate before whom the proceedings in insolvency are conducted, and within that limitation is complete and perfect. Whatever is actually done by him under that authority is fully warranted by the law. It binds all parties. It cannot be controlled by others or revoked by himself, but is final and conclusive upon all. In the exercise of this, as well as of all the other powers conferred by the statute upon the assignee, as the agent, representative and trustee of the creditors, in receiving, collecting, arranging and distributing the assets belonging to the estate, he is made accountable in various ways for any want of vigilance, activity or faithfulness. By the 18th section of the statute it is enacted, that this court shall have a general jurisdiction and superintendence as a Court of Chancery over all the proceedings of cases arising under it, and upon the petition, bill, or other proper process, presented thereto by aggrieved parties, may, in every case not otherwise specially provided for, hear and determine all matters of complaint, and make such orders and decrees as law and justice shall require. Under these provisions every unwarranted act may be restrained or rescinded, and every violation of duty controlled or repressed. This undoubtedly was the general purpose of the Legislature in conferring this authority. It was to secure a uniform, regular, and legal course of proceeding, to control all illegal action, and to afford a prompt and effectual remedy for any injuries which could not seasonably be prevented. The court, therefore, will always intervene, of course, upon the proper application of parties liable to be injuriously and wrongly affected by the exercise of authority, or the doing of acts not warranted by law. But it will not interfere, or exercise any of its extraordinary powers to regulate or control the arrangement of affairs, the proper disposition of which rests upon considerations merely of expediency and probable advantage. These, so far as an assignee is con-

cerned, being only matters of detail, if within the limit of authority conferred, will not be interrupted or disturbed if approved of by the commissioner of insolvency. The compromise and settlement with Phillips & Mosely made by the assignee, which is complained of in the bill, is exactly of this character, and comes within this description. He was expressly empowered and allowed by the statute to do acts of that kind. He did it under the direction and with the approbation of the commissioner. The bill does not suggest that it was collusive, fraudulent, or in any respect in violation of law. On the contrary, its legality is conceded, and it is only complained of as having been less beneficial and advantageous to other parties than a different course of proceeding might have been, or might still be, if this court would interfere to annul it. How this might be in the judgment of this court if it should assume and pursue the investigation, need not now be considered, because it is a matter confided specially to the judgment and discretion of the assignee under the direction of the commissioner in insolvency, and so the duty of its revision neither devolves nor is conferred on any other tribunal. For this first cause of complaint, therefore, the bill cannot be sustained.

To the other and further allegations of the complainants, that the respondent has claimed and been allowed by the commissioner in insolvency to retain out of the moneys which came into his hands as assignee an unreasonably large sum; his objection, that upon the facts set forth in the bill they have no right to make or insist upon it, seems to be a sufficient and decisive reply. No party ought to be allowed to avail himself of the authority conferred upon this court to exercise a general superintendence and jurisdiction over proceedings in insolvency, who has no interest in the supervision to be exercised, and the questions thereon to be determined. And there is nothing in the averments of the bill to show, or from which it may be inferred, that the complainants have or can have any interest in the matter of the compensation to be allowed to the assignee. The assignment of their estate to him was for the sole benefit of their creditors, and all its proceeds are pledged to the payment of the debts respectively due to them. And it is only upon the contingency that the assets thus in the hands of the assignee may be sufficient to pay fifty per cent. of the claims proved against his estate, beside necessary charges incurred in its settlement, that the debtor can have any interest in their appropriation. Rev. Stat., 1838, § 8; Stat. 1844, ch. 304, § 9. This sufficiency is neither alleged nor suggested in the bill; and therefore, as it does not appear that the complainants have any interest in the result, or

can derive any advantage from the granting of its prayer, they cannot be allowed to prosecute or maintain it.

These objections being decisive against the maintenance of the bill, it is unnecessary to consider the fourth cause of demurrer urged by the respondent, that it is multifarious by the union in it of two distinct and separate subjects of complaint — the allowance to the assignee, and the compromise with Phillips & Mosely; concerning which it is urged, that the proofs certainly, if not the parties interested also, are wholly dissimilar.

Demurrer sustained, and bill dismissed.

Edward Blake, for the plaintiff; *S. Bartlett*, for the defendant.

Miscellaneous Intelligence.

THE LATE APPOINTMENT OF REPORTER IN THE STATE OF MASSACHUSETTS. — The Governor of Massachusetts has recently appointed Horace Gray, Jr., of Boston, Reporter of the Decisions of the Supreme Judicial Court, in the place of Luther S. Cushing, resigned. While we regret that the late Reporter has felt compelled to resign his office, we take pleasure in expressing our gratification at the selection which has been made of his successor. Mr. Gray, as is well known to the profession, has recently assisted Mr. Cushing in the preparation of the Reports, and has at times occupied his seat upon the Circuit. The experience thus gained, while it has prepared the new Reporter for the duties of his office, has given to all those familiar with his discharge of that part of them which has hitherto devolved upon him, satisfactory evidence of his qualifications. He has an accurate habit of mind, carried even into minute details, with an excellent capacity for appreciating the points involved in a case, and expressing them with neatness, clearness and succinctness, besides great familiarity with decided cases.

We shall look to time and to his continued experience for the correction of the defects and the supplying of the deficiencies which can be corrected and supplied by age and experience only, and shall hope to see the volumes, which we anticipate from his hands, ultimately take the next, if not an equal rank, to those of his predecessor in the same office who now occupies a seat on the Bench of the Supreme Court of Massachusetts'; than which, in our estimation, no higher rank can be assigned to an American Reporter.

THE MARTHA WASHINGTON CASE. — We have received a letter from Judge Walker, of Cincinnati, in regard to a paragraph which we clipped from a newspaper and inserted in the January number of the Reporter, entitled "New way of getting a verdict." Judge W., although that paragraph does not so state, was one of the counsel for the defendants in the case referred to, and had already, it seems, defended himself and his colleagues from the imputation there cast upon them, in a communication to the Cincinnati Gazette, which he has enclosed to us. We take pleasure in republishing that communication below. It is sufficient for us to add, that no one can suppose he would be guilty of any conduct unbecoming an honorable advocate.

"THE MARTHA WASHINGTON CASE. — *To the Editor of the Cincinnati Daily Gazette.* Gentlemen: I have not supposed that any honest man, correctly informed of the facts, believes that either the court, the jury, or the counsel, were guilty of corruption or dishonesty in regard to this too celebrated trial. The verdict may have disappointed the public expectation, as very often happens when the testimony fails to prove guilt.

But from the following letter of inquiry, just received from a distinguished writer on ethics, especially '*the Ethics of the Lawyer*,' and now a Professor in South Carolina, I am satisfied that a great misapprehension exists as to some of the facts. In order to correct this misapprehension, I request space in your columns for a copy of this letter, and a brief statement of facts. Not having time to obtain the author's permission, I take the liberty of an 'old friend,' in publishing the letter.

Columbia, S. C., 27th November, 1853.

My dear Sir: Should you have read my 'Civil Liberty and Self-Government,' you will know that the ethics of the lawyer form a subject which has occupied me a good deal.

Quite lately, I read an account of some surprising occurrences in one of your courts, to this effect: That the defence directed three hundred witnesses to be sworn. Having thus thrown the prosecution off its guard, the defence examined some half dozen witnesses only, and demanded the trial to go on, in which the court coincided, and you know what I refer to. Could you not send me a paper containing a correct report of this trial, and what was the trial for? Excuse the trouble I give you, but the occurrence is of interest. Very truly, your old Friend,

Hon. T. Walker, Cincinnati, Ohio. FRANCIS LIEBER.

The statement of facts which I wish to make in answer to this, and all similar inquiries, is as follows:

The case was entitled, The United States *v.* Lyman Cole and others.

The indictment was for a conspiracy to burn the steamboat Martha Washington, with intent to injure underwriters.

Twelve persons were indicted, of whom nine were on trial.

The court was the Circuit Court of the United States for the District of Ohio, held by the Hon. John McLean, of the Supreme Court of the United States, and the Hon. Humphrey H. Leavitt, District Judge.

The trial occupied about four weeks.

The prosecution was conducted by Daniel O. Morton, U. S. District Attorney, Henry Stanberry and T. C. Ware. The defence, by Thomas Ewing, Noah H. Swayne, Durbin Ward, George H. Pendleton, and myself. I have not the names of the jurors who tried the case.

For the government about one hundred witnesses were examined in chief.

For the defence about seventy witnesses were examined, and then five rebutting witnesses by the government.

Many witnesses subpœnaed on both sides were not examined. The precise number I am not able to state, but I have no doubt that the defence discharged more witnesses unexamined than did the prosecution. Each side seems to have stopped when no more was deemed necessary.

I am quite sure that not nearly so many as 'three hundred' were '*sworn*' on either side; but, however that may be, the defence only followed the example of the prosecution, and the general usage, in having as many as answered to their names sworn at one and the same time.

Shortly after commencing the testimony for the defence, I requested to have all our witnesses sworn, to avoid a doubt as to their being able, unless sworn, to draw their pay from the government, the defendants,

at whose instance they were subpœnaed, having made the statutory affidavit of inability to pay them, but at the same time, I stated it to be quite probable many of them would not be examined. The reason (which it would not have been courteous then to state) was, that I did not think the government had made even a *primâ facie* case. So strongly was I impressed with this belief, that when the government had rested, I actually suggested, in our next conference, the expediency of dispensing with all the defendants' witnesses, and going to the jury upon the evidence of the prosecution alone. This might have been rash, but I thought it would be safe, and still think so.

We did, however, out of abundant caution, examine about seventy witnesses, being all we deemed necessary; and, on the day before closing, gave notice that we should probably close by noon of the next day, as we, in fact, did. This was all the notice we could have given, and was a longer and more definite notice than we had received from the other side, though we had publicly requested to be informed at least once, and I think more than once.

It may not be known, every where, that there were telegraph lines then operating between Columbus and Cincinnati, from which city the rebutting witnesses were to come, if there were any; and that three trains of cars arrived from Cincinnati at Columbus, between the notice given, and the closing of our testimony.

As to the refusal of the defendant's counsel to argue the case to the jury, after a speech of eight hours on the other side, I suppose the highest rule of '*ethics*' does not require time to be wasted in words, when counsel are satisfied that no answer is necessary.

I hope this statement will not be regarded either as an apology for, or a vindication of any one concerned in the trial. The object is simply to state the truth, as I understand it, and so correct a serious misapprehension. If either the court or counsel needed other vindication, it would come too late; for their reputation would not be worth defending.

I have had no opportunity to consult my colleagues, or any other than my own memoranda. I may not be precisely accurate as to the number of witnesses examined, but I cannot be far wrong.

T. Walker."

From the Cincinnati Daily Gazette of Dec. 8, 1853.

Notices of New Books.

Reports of Cases Argued and Determined in the Circuit Court of the United States for the First Circuit, 1851 - 1853. By B. R. Curtis, the Presiding Judge. pp. 539. Vol. I. Boston: Little, Brown, & Company. 1854.

Few men have ascended the bench with so general an acquiescence in the fitness of their appointment, as Mr. Justice Curtis. From the age of thirty, all agreed that he was intended by nature for the judicial office, and when the highest in New England was open, he was generally pointed to as the proper incumbent, though but little past the age of forty. His character is so eminently intellectual, there is so little to move or disturb

or color its exact and almost mathematical action, that, even without his scrupulous honesty, one would feel reasonably sure that the problems of the law would be faithfully worked out. In the trial of the "Rescue Cases," as they are familiarly called, in the midst of great excitement and much suspicion, when it was thought important by the government to procure convictions, although he held his office during the pleasure of the President, not having been confirmed by the Senate, his impartiality was conceded by all.

Under such a state of opinion, the profession will look with interest and high expectation to the present and future volumes of his Decisions. We have not had time to examine the leading opinions, but we cannot doubt that they will be marked by that clearness, conciseness, and power of statement, for which he is distinguished.

The formal part of the work we have looked at, and take the liberty to offer a few suggestions upon matters not of the essence of the book, but still well enough to be cared for.

In the first place, we see that the learned Judge often leaves out the names of the counsel who argue the cases. We do not believe that this will be well received by the profession. Beside the natural desire of lawyers to be connected historically with their causes, especially those by which they have made their reputations, there are reasons of utility and convenience in preserving the names of counsel. Weight is added to a judicial decision when it is seen to have been given against the argument of eminent men, and it is often a convenience to lawyers or judges at a distance to write to those who appear to have been engaged in cases, to ascertain more particularly their history, or the points and authorities presented, (or not presented,) where they have similar cases about to be tried, or are writing upon a subject involved in the decision. We do not wish to see the arguments of counsel given, but occasionally, in leading and doubtful cases, it is well to give the points and authorities of the losing counsel, that it may appear to other courts that the decision was made with a knowledge of them. There is the more reason why the reporter should do this occasionally, here, in the fact that in some cases he has reversed the decisions of his colleague, the very able and clear-sighted Judge of the District Court of the Massachusetts District; and in the absence of any reports of that court, the profession would usually find in the arguments of the losing counsel the substance of the decision of the District Judge. Nor is there any obvious reason why the names of counsel should be inserted in some cases, and omitted in others.

In the matter of entitling Admiralty cases, we acknowledge ourselves to be *martinets*. The proper title of an admiralty cause *in rem*, is the *res*. So it has been from the beginning. In all the English Admiralty Reports, without exception, from Christopher Robinson through Dodson, Haggard, Edwards, and William Robinson to the present time, and in the Law Magazines, this course is pursued. So in our own country, in the Admiralty Reports of Bee, Ware, and Davies, and in the Reports of the Supreme Court of the United States, at least until the irregularities of Howard, in the reports of this Circuit, until those of Woodbury & Minot, and almost without exception in the reports of other circuits. Judge Story was particularly tenacious on this point. Indeed, to an Admiralty lawyer, who has been brought up in the learning of *The Gratitudine*, *The Anna Catherina*, *The Indian Chief*, *The Woodrop Sims*, *The Two Catherines*, *The Saratoga* and *The Neptune*, it seems as awkward and unseamanlike to see a case entitled *Williamson* v. *The Brig Alphonzo and Cargo*, or *Hennessey* v. *The Ship Versailles and Cargo*, as it would to a sailor to see the owner's name painted on the ship's stern with the name of the ship, as

though it were a package of goods. We hope to see the venerable and interesting style of the Admiralty restored in the next volume. We might remark, moreover, that in this volume the usage is not uniform, in some cases the one style being followed, and in some the other.

The duties of the learned Judge are so arduous, presiding, in his Circuit, over causes in equity, admiralty, patent law and copy-right law, real law and personal law, local law and international law, civil actions and criminal indictments — and then at Washington, in the tribunal of the most enlarged jurisdiction, occupied with the most elevated and august topics of any court in Christendom — that we can hardly expect him to give much time to the niceties and details of getting up these volumes. It is no disparagement, therefore, to him, to observe that there are some errors of the press or manuscript uncorrected, and in some cases the facts or the course of the trial are not stated with fulness enough to guard against errors. In the case of *United States* v. *Robert Morris*, the decision is given in favor of a demurrer to a plea in abatement, and immediately we pass into the evidence on the new trial, without any intimation of leave being granted to plead over, and whether that leave is granted of right or by consent. So, in *Greene* v. *Briggs*, it does not appear in the outset that the replevin was for liquors. The points in the marginal notes are not always in the same order in which they occur in the opinion, and the mode of citation from Reports is not uniform, nor always full enough to prevent mistakes. We also protest against the publishers binding up with the Reports their catalogue of books for sale.

These are matters in abatement and not to the merits, indicating merely the want of care in the details and formal parts. We notice them only from our desire to see the shell in every way worthy of the kernel within.

Dutton & Wentworth's Edition of the Supplement to the Revised Statutes of Massachusetts.

The long title-page of this book which we have copied in our list of new publications received, indicates the nature of its contents. The revision of the Constitution there referred to, is the one prepared by Judge Cushing, recently Reporter. This office seems to descend in regular succession to the gentlemen who have superintended this edition of the laws. The recent appointment of Mr. Gray completes the list, but we hope it will not deprive us of his services in the continuation of this work.

Nothing is more important in such a volume — always useless without some guide to its contents, and often caught up hastily to determine some point at a moment's notice — than a full and accurate Index. This we are glad to find here. And we speak from some personal examination when we say, what we should have confidently expected from our knowledge of the gentleman who has prepared it, the last in the list of editors, that it is reliable and complete. The tables of the chapters and sections of the Revised Statutes and Supplemental Statutes, repealed, &c., by the Act of Amendment or subsequent statutes, are also very accurate. These additions alone are of far more value to the practising lawyer than the price of the work itself; and we hope the publishers will be fully encouraged in supplying the profession with such aids to the inquiry, often difficult and perplexing, into the real state of the statute law upon any of those matters which have been from time to time the subject of legislative experiment. A lawyer of our day may be pardoned for sharing the feeling expressed in the often-quoted saying of the great master of the common law — "If I am asked a question of common law, I should be ashamed if I could not immediately answer it; but if I am asked a ques-

tion of statute law, I should be ashamed to answer it without referring to the statute book."

English Reports in Law and Equity: containing Reports of Cases in the House of Lords, Privy Council, Courts of Equity and Common Law, and in the Admiralty and Ecclesiastical Courts; including also Cases in Bankruptcy and Crown Cases Reserved. Edited by Edmund H. Bennett and Chauncey Smith, Counsellors at Law. Vol. XVIII. Containing Cases in the House of Lords, the Queen's Bench, Common Pleas and Exchequer, and Ecclesiastical Courts, during the years 1852–53. Boston: Little, Brown & Company. 1853. pp. 652.

This excellent series of Reports has reached its eighteenth volume, and contains an unusual number of important cases. One of the cases reported is quite an interesting one in several respects, though perhaps of no great intrinsic legal importance. We refer to the matter of the delivery out of court of the will and codicil of the late Napoleon Bonaparte, p. 599, under date of February 17, 1853. The will was delivered to the foreign secretary, for the purpose of being given to the legal authorities in France; the ground of the application for the delivery being public policy.

New Publications received.

Reports of Cases Argued and Determined in the Surrogate's Court of the County of New York. By Alexander W. Bradford, LL. D., Surrogate. Vol. II. pp. 541. New York: John S. Voorhies, Law Bookseller and Publisher, 20 Nassau Street. 1854.

General Laws of the Commonwealth of Massachusetts, passed subsequently to the Revised Statutes. Vol. I. Containing the Statutes from 1836 to 1853, inclusive, together with the 12th and 13th Articles of Amendment of the Constitution of the Commonwealth. To which is prefixed, the Constitution of the Commonwealth as revised by striking out the annulled or obsolete portions, and inserting the Amendments in their proper places; and to which are added the valuation of the Polls and Property of the Commonwealth, and the Apportionment of Senators and Representatives made in 1841 and 1851; also, certain Resolves of a public nature. The Supplements, from 1836 to 1843, inclusive, edited by Theron Metcalf. Those from 1844 to 1850, with the Constitution and Resolves, by Luther S. Cushing. And the Supplements from 1851 to 1853, inclusive, by Luther S. Cushing and Horace Gray, Jr. pp. 1116. Boston: Printed and Published by Dutton & Wentworth. 1854.

English Reports in Law and Equity; containing Reports of Cases in the House of Lords, Privy Council, Courts of Equity and Common Law, and in the Admiralty and Ecclesiastical Courts; including also Cases in Bankruptcy, and Crown Cases Reserved. Edited by Edmund H. Bennett and Chauncey Smith, Counsellors at Law.

Vol. XVII., containing Cases in all the Courts of Equity during the year 1853. pp. 642. 1854.

Vol. XVIII., containing Cases in the House of Lords, the Queen's Bench, Common Pleas, and Exchequer and Ecclesiastical Courts during the years 1852–53. pp. 652. 1854. Boston: Little, Brown & Co.

Reports of Cases in Law and Equity, Argued and Determined in the Supreme Court of Arkansas, &c. &c. By E. H. English, Counsellor at Law. Vol. VIII. (and 13th of Ark. R.) pp. 867. Little Rock, Ark.: Published by John M. Butler.

EXPLORATION and Survey of the Valley of the Great Salt Lake of Utah, including a reconnoisance of a new route through the Rocky Mountains. By HOWARD STANSBURY, Captain, Corps of Topographical Engineers, U. S. Army. Printed by order of the House of Representatives of the United States. pp. 495. Accompanied by a Volume of Maps. Washington: Robert Armstrong, Public Printer. 1853.

WE have received the first number of a new journal called "The Law Reporter," published monthly, in French and English, at Montreal, by HEW RAMSAY. Conducted by T. K. Ramsay, Esq., Advocate, English Editor, and L. S. Morin, "Ecuier, Avocat," French Editor. We are happy to welcome this new comrade to our ranks. We are indebted to the Hon. S. H. Walley for the valuable Report of Capt. Stansbury above mentioned, and to Hon. S. A. Douglas for other documents.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Abbott, George W.	Randolph,	Jan. 14,	Samuel B. Noyes.
Alger, Columbus, et al.	Braintree,	" 18,	Samuel B. Noyes.
Alger, William O. et al.	Braintree,	" 18,	Samuel B. Noyes.
Atkins, Enoch M.	Granville,	" 28,	Henry Vose.
Badger, William M.	Waltham,	" 19,	Asa F. Lawrence.
Balkam, Elijah P.	Dorchester,	" 30,	S. B. Noyes.
Bancroft, Samuel A.	Salem,	" 18,	John G. King.
Barnes, Timothy	Alford,	" 31,	Charles N. Emerson.
Bickford, Ira H.	Melrose,	" 17,	John P. Putnam.
Bigelow, Timothy	Boston,	" 13,	John P. Putnam.
Bradford, Charles	Boston,	" 9,	Charles Demond.
Bragg, Austin	Boston,	Nov. 7,	Charles Demond.
Bryant, Daniel	Lowell,	Jan. 13,	Isaac S. Morse.
Burrell, John H.	Charlestown,	" 7,	Asa F. Lawrence.
Carpenter, John D. C.	Springfield,	" 11,	Henry Vose.
Cawday, Everett E.	Stoneham,	" 10,	Asa F. Lawrence,
Cobb, Samuel N.	Hadley,	" 19,	Haynes W. Chilson.
Crossman, James W.	Taunton,	" 23,	Edmund H. Bennett.
Crossman, James W. et al.	Taunton,	" 24,	Edmund H. Bennett
Daniels, Edward	Milford,	" 31,	A. H. Bullock.
Ellis, William J.	Boston,	" 11,	Charles Demond.
Ferguson, Dennis et al.	Boston,	" 10,	John P. Putnam.
Foster, George P. et al.	Taunton,	" 24,	A. H. Bullock.
Frye, James N.	Worcester,	" 28,	E. H. Bennett.
Gardner, Robert	Roxbury,	Dec. 10,	S. B. Noyes.
Greene, James W.	Woburn,	Jan. 26,	Asa F. Lawrence
Guild, Eli T.	Lynn,	" 9,	John G. King.
Herrick, George	Cambridge,	Jan. 12,	Asa F. Lawrence.
Hineman, Bernard et al.	Boston,	" 13,	Charles Demond.
Howe, Nathaniel L.	Clinton,	" 18,	A. H. Bullock.
Hubbard, Charles	Worcester,	" 14,	A. H. Bullock.
Jenkins, Nathaniel et al.	Boston,	" 13,	Charles Demond.
Kittredge, John D.	Boston,	" 20,	John P. Putnam.
Mayer, Matthias C.	Grafton,	" 17,	A. H. Bullock.
M'Clure, David S.	Springfield,	" 11,	Henry Vose.
O'Leary, Patrick	Boston,	Nov. 28,	Charles Demond.
Pecker, Robert E.	Boston,	Jan. 2,	Charles Demond.
Pond, Benjamin A.	Worcester,	" 17,	A. H. Bullock.
Rhodes, Marcus M. et al.	Taunton,	" 21,	Joshua C. Stone.
Rhodes, Marcus M. et al.	Taunton,	" 24,	Edmund H. Bennett.
Rhodes, Stephen et al.	Taunton,	" 21,	Joshua C. Stone.
Rhodes, Stephen et al.	Taunton,	" 24,	Edmund H. Bennett
Rice, Seth H.	Boston,	Dec. 16,	Charles Demond.
Seaver, True W.	Boston,	Jan. 23,	John P. Putnam.
Siemers, Christian H.	Boston,	" 3,	Charles Demond.
Snow, Linus W.	Bridgewater,	" 13,	Welcome Young.
Toxer, William, Jr.	Mansfield,	" 7,	Edmund H. Benne
Tufts, George W.	Rockport,	" 3,	John G. King.
Walker, Justin E.	Lowell,	" 26,	Isaac S. Morse.
Whittemore, Kendal	Worcester,	" 23,	A. H. Bullock.

LAW SCHOOL OF THE UNIVERSITY AT CAMBRIDGE.

THE INSTRUCTORS IN THIS SCHOOL, ARE

Hon. Joel Parker, LL. D., Royall Professor.

Hon. Theophilus Parsons, LL. D., Dane Professor.

Hon. Edward G. Loring, University Lecturer.

The design of this Institution is to afford a complete course of legal education for gentlemen intended for the Bar in any of the United States, except in matters of mere local law and practice; and also a systematic, but less extensive course of studies in Commercial Jurisprudence, for those who intend to devote themselves exclusively to mercantile pursuits.

The course of instruction for the Bar embraces the various branches of the Common Law; and of Equity; Admiralty; Commercial, International, and Constitutional Law; and the Jurisprudence of the United States.—Lectures are given, also, upon the history, sources, and general principles of the Civil Law, and upon the theory and practice of Parliamentary Law.

The Law Library consists of about 14,000 volumes, and includes all the American Reports, and the Statutes of the United States, as well as those of all the States, a regular series of all the English Reports, the English Statutes, the principal Treatises in American and English Law, besides a large collection of Scotch, French, German, Dutch, Spanish, Italian, and other Foreign Law, and a very ample collection of the best editions of the Roman or Civil Law, together with the works of the most celebrated commentators upon that Law.

Instruction is given by oral lectures and expositions, (and by recitations and examinations, in connection with them,) of which there will be ten every week.

Two Moot Courts are also holden in each week, at each of which a cause, previously given out, is argued by four students, and an opinion delivered by the presiding Professor.

The applicant for admission must give a bond, in the sum of $200, to the Steward, with a surety resident in Massachusetts, for the payment of College dues; or deposit, at his election, $150 with the Steward, upon his entrance, and at the commencement of each subsequent term, to be retained by him until the end of the term, and then to be accounted for.

Students may enter the School in any stage of their professional studies or mercantile pursuits. But they are advised, with a view to their own advantage and improvement, to enter at the beginning of those studies, rather than at a later period.

The course of studies is so arranged as to be completed in two academical years; and the studies for each term are also arranged, as far as they may be, with reference to a course commencing with that term, and extending through a period of two years; so that those who are beginning the study of the law may enter at the commencement of either term, upon branches suitable for them. Students may enter, also, if they so desire, in the middle, or other part of a term. But it is recommended to them to enter at the beginning of an Academical year, in preference to any other time, if it be convenient. They are at liberty to elect what studies they will pursue, according to their view of their own wants and attainments.

The Academical year, which commences on Thursday, six weeks after the third Wednesday in July (27 August, 1851,) is divided into two terms, of twenty weeks each, with a vacation of six weeks at the end of each term.

During the winter vacation, the Library will be opened, for the use of those members of the School who may desire it.

The tuition fees are $50 a term, and $25 for half or any smaller fraction of a term; which entitles the student to the use of the College and Law Libraries, and Text Books, and a free admission to all the Public Lectures delivered to undergraduates in the University, comprising Lectures on Anatomy; on Mineralogy and Geology; on the Means of preserving Health; on History; on Rhetoric and Criticism; on Botany; and on Physics and Astronomy.

Students who have pursued their studies for the term of eighteen months in any law institution having legal authority to confer the degree of Bachelor of Laws, one year of said term having been spent in this School; or who, having been admitted to the Bar after a year's previous study, have subsequently pursued their studies in this School for one year, are entitled, upon the certificate and recommendation of the Law Faculty, and on payment of all dues to the College, to the degree of Bachelor of Laws.

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